



# **TRANSCRIPT OF RECORD.**

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1898.**

**No. 201.**

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**H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, ET AL.,  
APPELLANTS,**

**v.**

**THE SAN DIEGO LAND AND TOWN COMPANY OF  
MAINE.**

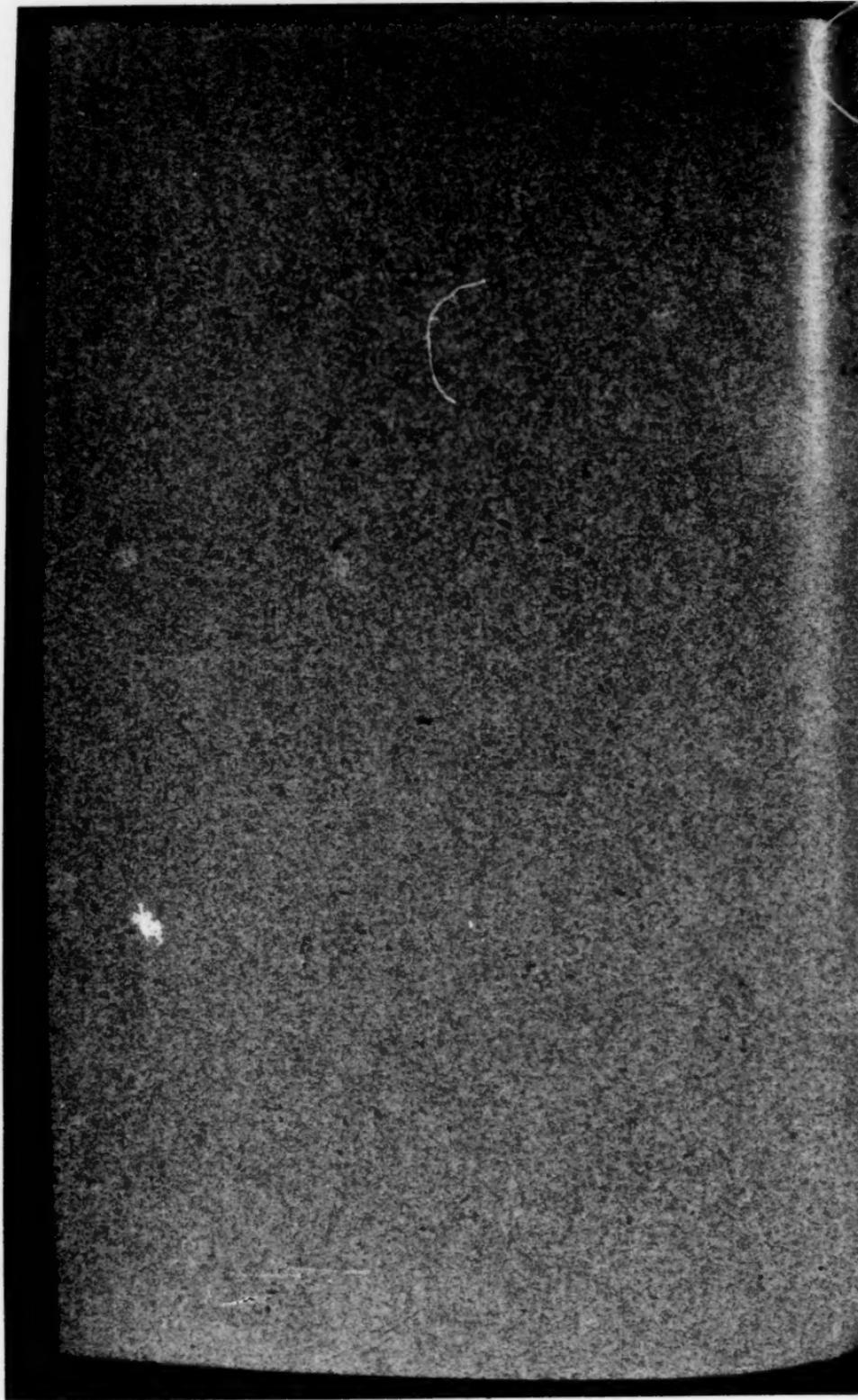
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**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF CALIFORNIA.**

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**FILED JANUARY 30, 1899.**

**(17,286.)**



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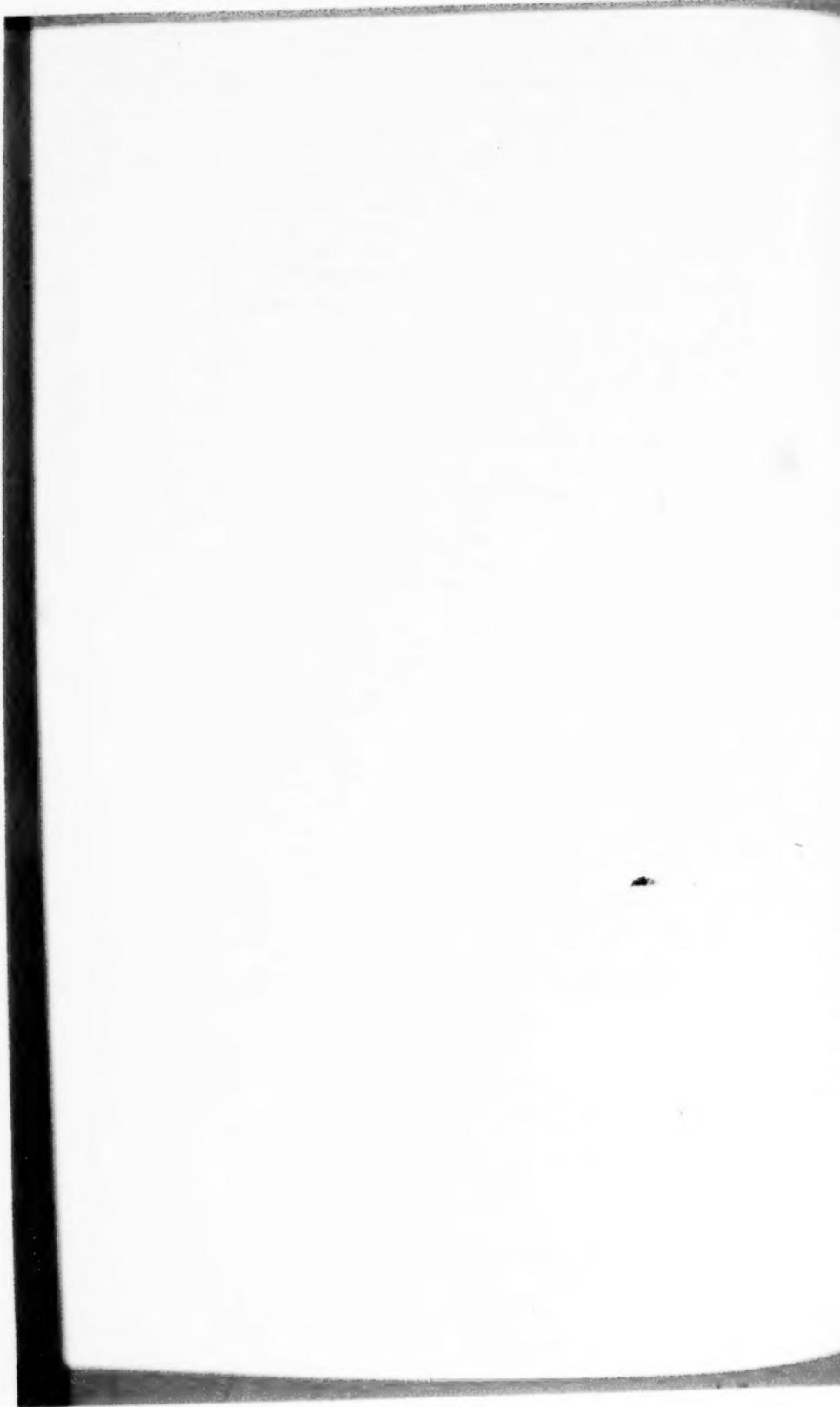
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## a UNITED STATES OF AMERICA, 88:

To San Diego Land & Town Company of Maine, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 1st day of February, A. D. 1899, pursuant to an order allowing an appeal entered in the clerk's office of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California from a final decree made and entered on the 5th day of December, 1898, in that certain cause being in equity, No. 839, wherein H. C. Osborne, William Kuapp, A. Barber, Mrs. E. L. Williams, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr., H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merrian, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdoch, Dan. P. Stetzelberger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, Herman Banke, J. C. Alles, D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Elisha M. Gavin, Stephen Shefield, C. A. Whittemore, F. Gardner, Charles Monnike, Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Groat, R. H. Long-share, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Ham-mack, Wah Hong, Edward Gulick and William Gulick and Henry Gulick, partners, doing business under the firm name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, W. J. Henderson, P. W. Morse, O. Darling, S. J. Bradt, R. W. Vaughan, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoeh, C. S. Johnson, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klamer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quinn, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quincy A. Petts, Morton Penfield, J. A. Thomas, J. O. Reinhart, William Doyle, F. O. Reinhart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terril, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elisabeth A. Garrettson, executors of the estate of G. A. Garrett-

son, deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klamer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, partners, doing business under the firm name of Howe Brothers; Arthur Ryan and Michael Mack, partners, doing business under the firm name of Ryan and Mack; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberfellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George F. McMurry, F. H. Downes, N. W. Downes are complainants and appellants and you are defendant and appellee, to show cause, if any there be, why the said decree rendered against said appellants, as in the said order allowing the appeal mentioned, should not be corrected and speedy justice should not be done to the parties c in that behalf.

Witness the Honorable Erskine M. Ross, United States circuit judge for the ninth circuit, this 20th day of January, A. D. 1899, and of the Independence of the United States the one hundred and twenty-third.

Jan'y 20, 1899.

ERSKINE M. ROSS,  
*United States Circuit Judge for the Ninth Circuit.*

d [Endorsed:] In the Supreme Court of the United States.  
H. C. Osborne et al., appellants, vs. San Diego Land & Town Company of Maine, appellee. Citation. Service of the within citation is hereby acknowledged this 20th day of January, 1899. Works & Works, solicitors for complainant and appellee. Filed Jan. 20, 1899. Wm. M. Van Dyke, clerk. — — — , deputy.

1 In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California.

No. 839.

H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, MRS. E. L. WILLIAMS, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr.; H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phimney, D. L. Murdock, Dan. P. Stetzelberger.

R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, Herman Banke, J. C. Alles, D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Eliska M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Monnike, Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Groat, R. H. Longshare, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah

Hong, Edward Gulick and William Gulick and Henry  
2 Gulick, Partners, Doing Business under the Firm Name of

Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, W. J. Henderson, P. W. Morse, O. Darling, S. J. Bradt, R. W. Vaughan, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoeh, C. S. Johnson, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klamer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quinn, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quiney A. Petts, Morton Penfield, J. A. Thomas, J. O. Reinhart, William Doyle, F. O. Reinhart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terrell, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elisabeth A. Garrettson, Executors of the Estate of G. A. Garrettson, Deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klamer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, Partners, Doing Business under the Firm Name of Howe Brothers; Arthur Ryan and Michael Mack, Partners, Doing Business under the Firm Name of Ryan and Mack; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberfellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George F. McMurry, F. H. Downes, N. W. Downes, Complainants,

v8.

SAN DIEGO LAND & TOWN COMPANY OF MAINE, Defendant.

3 In the Circuit Court of the United States, Ninth Circuit,  
Southern District of California.

No. 839.

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v8.

SAN DIEGO LAND & TOWN COMPANY OF MAINE, Defendant.

*Bill in Equity.*

To the honorable the judges of the circuit court of the United States within and for the southern district of California, sitting in equity:

5        Humbly complaining, show unto your honors your orators, H. C. Osborne, William Knapp, A. Barber, E. L. Williams, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr.; H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegemau, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spence Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, Charles O. Brown, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, Herman Banke, J. C. Ailes, D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Elisha M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Mohrniike Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Grout, J. H. Bowen, R. H. Longshare, W. O. Bowen, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenberg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick and Henry Gulick, partners, doing business under the firm name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, W. J. Henderson, P. W. Morse, O. Darling, S. J. Bradt, R. W. Vaughan, F. A. Moses, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, E. N. Morse, Emil O. Hoeh, 6        C. S. Johnson, C. W. Ellsworth, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klamer, J. H. Dean, P. S. Leisenring, J. M. Johnson

Ah Quin, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quincy A. Pettis, Morton Penfield, J. A. Thomas, J. O. Rhinehart, William Doyle, F. O. Rhinehart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terrell, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elizabeth A. Garrettson, executors of the estate of G. A. Garrettson, deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klamer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, partners, doing business under the firm name of Howe Brothers; Arthur Ryan and Michael Mack, partners, doing business under the firm name of Ryan & Mack; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, William Campbell, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberfellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George F. McMurry, F. H. Downs, N. W. Downs, and residents and citizens of the county of San Diego, in the State of California, and in the district aforesaid:

That on the 6th day of January, 1896, Chas. D. Lanning, as receiver of the San Diego Land & Town Company, a corporation organized under the laws of the State of Kansas, hereinafter named, exhibited his bill of complaint in this honorable court against your orators and thereby set forth in words and figures the following, to wit:

*"Bill in Equity."*

To the honorable the judges of the circuit court of the United States within and for the southern district of California,  
7 sitting in equity:

Charles D. Lanning, a resident and citizen of the State of Massachusetts, receiver of the San Diego Land & Town Company, a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and a resident and citizen of said State, brings this his bill against H. C. Osborne, William Knapp, A. Barber, E. L. Williams, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr., H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spencer Sullivan, W. C. Kimball, J. C. Frisbie, S. W. Morgan, George Hannahs, Charles O. Brown, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Haines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzell-

berger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslie, Herman Banke, J. C. Ailes, D. K. Adams, A. J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Elisha M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Mohnike, Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Grout, J. H. Bowen, R. H. Longshare, W. O. Bowen, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick and Henry Gulick, partners, doing business under the firm name of  
8 Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, H. H. Rice, W. J. Henderson, P. W. Morse, O. Darling, Walter Price, S. J. Bradt, R. W. Vaughn, F. A. Moses, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoeh, C. S. Johnson, C. W. Ellsworth, Wm. Steckle, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klamer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quin, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, —— Lounsbury, George W. De Tar, S. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quiney A. Pettis, Morton Penfield, J. A. Thomas, J. O. Rhinehart, William Doyle, F. O. Rhinehart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. F. Terrill, T. G. Ellis, W. M. Carr, D. F. Garretson and Elizabeth A. Garretson, executors of the estate of G. A. Garretson, deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klamer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, partners, doing business under the firm name of Howe Brothers; Arthur Ryan and Michael Mack, partners, doing business under the firm name of Ryan and Mack; F. E. Leslie and H. P. Whitney, partners, doing business under the firm name of Leslie & Whitney; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, William Campbell, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberfeller, F. Mederle, L. C. Wright, Cyrus Johnston, A. W. Howard, Laura F. Meyer, George F. McMurry, F. H. Downs, N. W. Downs, and I. P. Dana, residents and citizens of the county of San Diego, in the State of California and in the district aforesaid.

And your orator complains and says that the San Diego Land & Town Company is and was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Kansas and doing business in the State of  
9 California.

That the said company is and has been during said times

the owner of valuable water, water rights, reservoirs, and an entire water system for furnishing water to consumers for domestic irrigation and other purposes for which water is needed for consumption and of a franchise for the impounding, sale, disposition, and distribution of the waters owned and stored by it to the defendants and other consumers and to the city of National City and its inhabitants.

That its main reservoir and supply of water is and was at the times hereinafter mentioned situate in the Sweetwater river, so called, a small stream in the said county of San Diego, about five miles distant from the city of National City, and its system of reservoirs, mains, flumes, aqueducts, and pipes covers and can supply but a limited amount of territory, consisting of certain farming lands within and outside of said National City and in part of the residence portion of said city of National City.

That your orator was on the 4th day of September, 1895, by an order and decree of the circuit court of the United States for the district of Massachusetts, duly made and entered, appointed receiver of all of the property of the San Diego Land & Town Company, with full power to take possession of and manage, operate, and control all of its said property, including the plant and water system in this bill mentioned, and that by an order and decree of this court, duly made and entered on the 30th day of September, 1895, the said first named order and decree was duly confirmed as to all property of said company within the jurisdiction of this court, including said water plant and system, and your orator was by said last-named order duly appointed receiver of said property, with full power and authority to manage and control the same, and,

by virtue of said orders and decrees, your orator took possession of and is managing said property as such receiver.

That the said company has, in procuring the water and water rights, reservoirs, and distributing system owned by it, as aforesaid, and preparing itself to supply consumers with water, expended, up to January 1, 1896, the sum of one million twenty-two thousand four hundred seventy-three and  $\frac{54}{100}$  dollars (\$1,022,473.54), which was reasonably necessary for said purposes.

That by the expenditure of said large sum said company has procured and owns, subject to the public use and the regulation thereof by law, water, water rights, a reservoir site, and a reservoir of the capacity of six thousand million gallons of water, and has constructed and laid therefrom its water mains necessary to supply the defendants and their lands, hereinafter mentioned, and the said city of National City and its inhabitants with water, and has constructed and put in mains, pipes, and all other things necessary to connect said water supply with the premises and buildings of the defendants and each of them and with the premises and buildings of said city and its inhabitants and to furnish them and each of them with water, and was at the time hereinafter mentioned furnishing them and each of them with water.

Your orator further shows that the defendants herein are the owners, respectively, of tracts of land under the system of said

land & town company, most of said defendants owning and holding small tracts of only a few acres each.

That each of said defendants has, by purchase or otherwise, become the owner of a water right—to a part of the water appropriated and stored by said company necessary to irrigate his tract of land—and is liable to pay for the use of said water yearly rental such as said company is entitled to charge and collect.

That the annual expense of operating and keeping in repair the said reservoir and water system of said company and further furnishing said consumers with water is, including interest on its bonds and excluding the natural and necessary depreciation of its system, \$33,034.99.

That in order to pay the said company the amount of its annual expenses and income of six per cent. on the amount actually invested in its said water, water rights, and water system up to the first day of January, 1896, it is necessary that such rates for water sold and consumed be so fixed as to realize to the said company the sum of one hundred nineteen thousand seven hundred ninety-one and  $\frac{6}{10}$  dollars (\$119,791.66).

That the total amount that was realized by the said company from sales of water and water rights and from all other sources on account of its business of supplying water to consumers, as aforesaid, outside of the said city of National City for the year ending January 1st, 1896, was about fifteen thousand dollars (\$15,000.00), and no more than that sum can probably be realized for the year ending January 1st, 1897, at the rates now prevailing.

That all of the mains and pipes of the said company and other parts of its property so used in furnishing water to consumers are perishable property and require to be replaced at least once in sixteen years and require frequent repairs.

That in order to acquire said water and water rights and construct its said system of water works said company was compelled to and did borrow large sums of money, to wit, three hundred thousand dollars (\$300,000.00), and it is compelled to pay as interest thereon the sum of twenty-one thousand dollars (\$21,000.00) annually, which sum must be realized from the sale of its water and is a part of its operating expenses; that the proportionate share of the revenue of the said company that should be raised by water rates within the limits of said National City, as compared with the revenues that should be raised and paid as water rates by consumers outside of said city, is about one-third.

12 That the amount that can be realized from said city and its inhabitants per annum from the rates now prevailing under the ordinance hereinafter mentioned is about ten thousand seven hundred and fifteen dollars (\$10,715.00) per annum and no more.

That the value of the water, water rights, reservoirs, franchises, and property necessary for the proper operation of its business and now owned by said company is one million one hundred thousand dollars (\$1,100,000.00), and the same is necessary for the use of the

said company in furnishing water to said defendants and other consumers.

That no other person or corporation is or ever has been furnishing a supply of water to said defendants and other consumers, nor is there now nor has there been any other system of water works by which said defendant can be furnished with water, but the franchise and right of the company to furnish water to said consumers is not exclusive of other persons or corporations.

That the said city of National City is a municipal corporation of the sixth class organized under the general laws of the State of California, and the rates to be charged for water within said city are fixed by the board of trustees of said city, as provided by the laws of the State of California; that on the 20th day of February, 1895, the said board of trustees, assuming and claiming to act under and in accordance with the constitution and laws of said State, passed and adopted an ordinance of said city fixing the water rates to be charged for water sold and furnished by said company to consumers within said city.

Your orator further shows to your honors that said land & town company commenced to furnish water to consumers in the year 1787; that it was informed by its engineer that its system and the supply of water that could be stored thereby would furnish water to consumers sufficient to irrigate twenty thousand acres of land

and supply such water, in addition thereto, as would be necessary for domestic use inside and outside of said city of

National City; that the company was then unfamiliar with the operation of a plant and system of the kind constructed by it, and did not know what the cost of operating and maintaining the same would be; that, relying upon the said report and estimate of its engineer as to the probable duty of its reservoir and the capacity of its said system and believing that by fixing and charging an annual rate of \$3.50 per acre for irrigation it could meet its operating expenses and pay it some interest on its investment, it fixed and established and has since charged said rate of \$3.50 per acre per annum and no more until January 1st, 1896; but your orator further shows to your honors that instead of being able to supply from its said system sufficient water to irrigate twenty thousand acres it has been demonstrated by its actual experience that said system will not supply water sufficient to irrigate to exceed seven thousand acres, together with the water demanded for domestic use, and it is believed not to exceed six thousand acres, although there are about ten thousand acres under said system susceptible of irrigation.

And your orator further shows that at the rate of \$3.50 per acre, if water should be demanded and used upon the whole of the lands which the system is able to supply with water and rates are allowed to said National City equally high for domestic use and irrigation, said company would not be able to pay its operating expenses and maintain its plant and system, and that said company has been and still is, under said rates, losing money every year, and its said plant and system has been and is gradually going to decay from natural

depreciation consequent upon its use and supplying consumers with water without any revenue or means being provided for replacing the same, whereby the said system and the money invested by said company therein will be wholly lost to it, and it will, if said rate of \$3.50 per acre is maintained, be compelled to furnish water to consumers at an actual and continual loss.

14 Your orator further shows that in order to pay the cost of operating the plant of said company and maintain the same and pay said company a reasonable interest on its investment in said plant, or a reasonable sum for its services in supplying water to the defendants and other consumers, it will be necessary for it to charge a rate per acre per annum of not less than \$7.00 for irrigation purposes; that said sum of \$7.00 per acre is a reasonable rate for consumers to pay and the smallest amount for which said company can furnish the water without loss to it.

Your orator further shows that by the laws of the State of California the board of supervisors may, upon the petition of twenty-five inhabitants and tax-payers of the county, fix the rates of yearly rental to be collected by any company furnishing water to consumers, but no such petition has ever been presented or rates fixed in the case of the said land & town company.

Your orator further shows that for the reasons above stated said land & town company gave notice to the defendants that on January 1st, 1896, it would establish a rental of \$7.00 per acre per annum for water supplied to their and each of their lands for irrigation, and that from and after said date they and each of them would be required to pay said sum for the irrigation of their and each of their lands, and your orator, after his appointment as receiver, as aforesaid, and before said date, gave a similar notice.

Your orator further shows that the said defendants and each of them have refused to pay said rate of \$7.00 per acre, and maintain that neither the said land & town company nor your orator, as receiver thereof, have any legal right to increase the amount of rental to be paid by them or any of them, and that the rate of \$3.50 established and collected by the said land & town company must be and remain the established rate of rental until a rate 15 is established by the board of supervisors of the county in which said plant is situated, as provided by law.

Your orator further shows that an increase of the rate for such rentals is absolutely necessary to enable him to maintain and operate said plant and pay the expenses of such maintenance and operation as he is required by law to do.

And your orator further shows that in order to enforce the payment of said rentals he has, as he is authorized by law to do, caused the water to be shut off from the premises of the defendants and each of them until such rentals are paid, and said defendants threaten to and will, unless restrained from so doing by this court, commence suits in the superior court of the county of San Diego, State of California, to compel your orator to turn on and furnish water to their said lands without the payment of \$7.00 per acre rental on the ground that they are entitled to the use of said water for \$3.50 per

acre, the rate heretofore prevailing, and for damages for cutting off their said supply of water; that the rights of said defendants are the same, and the determination of the question of the right of said land & town company and of your orator to increase the rate of rental to be charged and collected will affect all of the said defendants in the same way and to the same extent, except that the quantity of land owned by the several defendants is different.

And your orator further shows to your honors that the bringing of said suits by said defendants separately will involve the said land & town company, your orator, and said defendants in a multiplicity of suit- and put them and each of them to great and unnecessary cost and expense, and will seriously hinder your orator in the proper operation and management of the property of said company and the settlement of its outstanding debts, liabilities, and obligations, when all of the questions involved in such litigation and the rights

of all of the parties in interest can be better settled and de-  
16 terminated in one suit, and vexatious litigation and unneces-

sary expense and unnecessary interference with your orator's management and control of the property and business of said company be thereby avoided.

Your orator further shows that the proposed increase in rates will add to the revenue and earnings of said company from the sale and distribution of the water from its said system, with the amount of land now under irrigation, not less than \$14,000.00 per annum, and upon the whole of the lands that can be irrigated by the system of the company of not less than \$21,000.00 per annum.

Your orator further shows that, as he is informed and believes, the defendants Chula Vista School District, Sunnyside School District, and Sweetwater School District are corporations duly organized and existing under the laws of the State of California; the defendants Edward Gulick, William Gulick, and Henry Gulick are partners, doing business under the copartnership name of Gulick Brothers; the defendants D. F. Garretson and Elizabeth A. Garretson were, on the 5th day of September, 1895, by an order of the superior court of the county of San Diego, State of California, duly made and entered, appointed executors of the estate of G. A. Garretson, deceased, and duly qualified as such executors and are now acting as such; the defendants I. M. Howe and H. B. Howe are partners, doing business under the copartnership name of Howe Brothers; the defendants Arthur Ryan and Michael Mack are partners, doing business under the copartnership name of Ryan and Mack, and the defendants F. E. Leslie and H. P. Whitney are partners, doing business under the firm name of Leslie & Whitney.

Wherefore your orator prays your honors to grant to him the writ of injunction against the defendants and each of them, enjoining them from prosecuting in the State courts or elsewhere separate actions against your orator or said land & town company; that

17 said defendants and each of them be required to appear in this suit and set up any claims they may have against the right of your orator or said company to increase the rental for water furnished by said company, as aforesaid, and that it be

finally decreed by this court that your orator, as such receiver, and said company have the right to increase the amount of its rentals to any reasonable sum, and that the sum of \$7.00 per acre per annum is a reasonable rental to be charged, and that the defendants and each of them be required to pay said rate as a condition upon which water shall be furnished to them, and that your orator shall have generally such other and further relief as the nature of his case may require.

Therefore will your honors grant unto your orator the writ of subpoena issuing out of and under the seal of this court, to be directed to said defendants, commanding them and each of them by a certain day and under a certain penalty therein inserted to appear before your honors in the circuit court aforesaid, and then and there answer the premises and abide the order and decree of the court.

WORKS & WORKS,  
*Solicitors for Complainant.*

STATE OF CALIFORNIA, }  
County of San Diego, }<sup>ss</sup>:

John E. Boal, being duly sworn, says that he is the agent of the receiver of The San Diego Land & Town Company, complainant in the above-entitled cause; that he has read the foregoing bill in equity and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

JOHN E. BOAL.

Subscribed and sworn to before me this 4th day of January, 1896.

[SEAL] LEWIS R. WORKS,  
*Notary Public in and for the County of San Diego,*  
18 *State of California."*

And your orators having appeared in said cause, and having put in an original answer, an amended answer, and a supplemental answer, and the whole of the same having been expunged from the record upon exceptions filed by the said C. D. Lanning, receiver, complainant therein, for irrelevancy and impertinence, and your orators having been directed to make further answer, your orators did, upon the 13th day of September, 1897, put in and file their further answer and supplemental answer to said bill in words and figures following, to wit:

(After title of cause and commencement of answer in the usual form.)

The court having sustained exceptions to the original answer, and to the amended answer, and to the supplemental answer heretofore filed for irrelevancy and impertinence, and having expunged the same, and having also sustained exceptions for insufficiency and directed further answer to be made by the defendants herein, now

these defendants, saving and reserving unto themselves the benefits of all exceptions to the errors and imperfections in the bill contained, for further answer and supplemental answer to so much thereof as they are advised it is necessary or material for them to answer to, do aver and say that—

They admit that the San Diego Land & Town Company is and at all times mentioned in the complaint was a corporation duly organized and existing under and by virtue of the laws of the State of Kansas and doing business in the State of California; and they aver that the corporate powers of said corporation, as declared in its articles of association, are as follows, to wit:

"The purpose for which this corporation is formed are the encouragement of agriculture and horticulture, the maintenance of public works, the maintenance of a public and private cemetery;

19      the purchase, location and laying out of town sites and the sale and conveyance of the same in lots and subdivisions or otherwise; the supply of water to the public; the erection of buildings and the accommodations and loan of funds for the purchase of real property; the establishment and maintenance of a hotel; the promotion of immigration; the construction and maintenance of sewers; the erection and maintenance of market-houses and market places; the construction and maintenance of dams and canals for the purpose of water works, irrigation or manufacturing purposes; the conversion and disposal of agricultural products by means of mills, elevators, markets and stores, or otherwise; the accumulation and loan of funds; the erection of buildings and the purchase and sale of real estate for the benefit of its members. And the construction and maintenance of such other improvements as may be necessary or desirable for the proper exercise of any or all such corporate purposes."

They deny that said corporation is or at any time was the owner of any water or water rights or reservoir or any water system, as alleged in the bill of complaint, except as hereinafter set forth, or that it is or at any time was the owner of any water or water rights or reservoirs or any water system for or devoted to any purpose except as hereinafter set forth.

They admit and say that said company became, as hereinafter set forth, the owner of a dam, reservoir, and an entire water system, adapted to the furnishing of water for domestic, irrigation, and other purposes for which water is needed for consumption; and of the corporate franchise, as in its said articles of incorporation set forth; and they say that said dam and reservoir are entirely on land, constituting part of the bed of the Sweetwater river, and on riparian land on both sides of said river, contiguous thereto.

That said corporation became the owner in fee-simple of 20      the ground occupied by its dam, reservoir, pipe lines, and conduits, and all the real estate occupied by its water system, by private grants to it from the owners thereof by mesne conveyances from the owners of the Mexican grants in said San Diego county, known as the Rancho de la Nacion and the Jamacha rancho; that it acquired the title to all the said land occupied by its reservoir

prior to 1886, except a tract of three hundred and fifty-five acres in the extreme upper end of the reservoir, which it acquired in 1891 by grant to it from George H. Neale and wife, the then owners.

That said Rancho de la Nacion contains 26,631.94 acres of land and has its western boundary on San Diego bay, a navigable water of the Pacific ocean, from whence it extends eastward about seven miles, and that the patent for said rancho was duly issued by the United States Government on February 27th, 1866.

That said Jamacha rancho adjoins said Rancho de la Nacion on the east and contains two square leagues of land; that the said grant was duly confirmed by the district court of the United States for California on March 9th, 1858, and that the United States duly issued a patent conformably thereto.

That the said Sweetwater river flows westerly through said Jamacha rancho, and, pursuing the said course, passes from it into said Rancho de la Nacion, and, flowing nearly through the center of said last-named rancho for about seven miles, has its mouth therein, where it empties into San Diego bay at the western boundary of said last-named rancho.

That on the 9th day of June, 1869, Frank A. Kimball and Warren C. Kimball were and for a long time prior thereto had been the owners in fee of said National rancho, and of all and singular the bed of the said Sweetwater river, and of all the land on each side thereof and contiguous thereto in said Rancho de la Nacion  
21 from the eastern boundary thereof, being also the western boundary of said Jamacha rancho, downward, along, and upon the said Sweetwater river to the place where it empties into the bay of San Diego.

That afterwards, as early as the year 1881, said company acquired title in fee to all the waters then flowing and thereafter to flow in said Sweetwater river in and through said Rancho de la Nacion, with the right to divert the same from its natural channel at any point or points in said rancho, by a regular chain of mesne grants and conveyances under a grant and conveyance of the same made by said Frank A. Kimball and Warren C. Kimball, on said 9th day of June, 1869.

That by reason of the premises the said company became the owner in fee-simple of all the water in and riparian rights on the said Sweetwater river and of the bed of said river from the highest flowage point of its reservoir, in said Jamacha rancho, down to said San Diego bay, and that it acquired such ownership prior to the year 1886, except as to that portion thereof at the extreme upper end of said reservoir, acquired from said Neale and wife in 1891, as aforesaid.

That, pursuant to the provisions of title VIII of the Civil Code of California, said company caused to be posted and recorded in Book One (1) of the Record of Water Claims for San Diego County notices each respectively of the appropriation of 5,000 inches of water of said Sweetwater river at the location of said dam; one of said notices in the month of September, 1886, recorded at page 171; one in the month of September, 1887, recorded at page 178; one in the

month of April, 1887, recorded at page 248; all in said Book One (1).

That each of said notices contained the designation of the purposes for which the said water was claimed in the words following, to wit:

"The purposes for which said undersigned claims said water are  
to supply for culinary and irrigation purposes the watering  
22 of live stock and other domestic uses to the lands north and  
south of the Sweetwater river and adjacent thereto."

That in the month of August, 1888, said company in its own name posted and filed for record a notice of appropriation of 75,000 inches of continuous flow of said Sweetwater river for the purposes set forth in said notice in words following, to wit:

"The purposes for which said water is claimed is to divert *an* and  
distribute the same through pipes, flumes, ditches for the purpose  
of irrigation, domestic, manufacturing, and such other uses and  
purposes as may be practicable and expedient."

But defendant avers that at the time of the filing and recording of each of said notices of appropriation and of the commencement of the construction of said irrigation system the riparian land on said Sweetwater river and its tributaries and the beds thereof above the reservoir were substantially all in private ownership, and almost none of said riparian land or beds of the streams were public lands of the State of California or the United States.

And defendants say that in November, 1886, the said corporation commenced the construction of its dam to impound and store said water in its said reservoirs, and thereafter prosecuted work upon the same and upon its system of mains and lateral pipes for furnishing said water for use and consumption, and by February, 1888, had completed the same.

That the location of said dam is across the channel of said Sweetwater river, at a point within the boundaries of said Rancho de la Nacion, about one-fourth of a mile west from the eastern boundary thereof, and is so located that the whole reservoir, capable of being filled by the same, is on lands so acquired by said company in said Rancho de la Nacion and Jainacha rancho.

That the capacity of said reservoir is six thousand million gallons, and that the water system of said company covers and can supply about 9,000 acres of the 12,000 acres of territory thereunder, consisting of certain farming lands within and outside 23 of said National City; and, in addition to supplying said 9,000 acres, can supply the domestic uses and needs of a population, when settled upon said lands within and without said National City and on village property within said city, of 20,000 persons.

And defendants admit that said company has, in acquiring the water rights, reservoir, and distributing system as aforesaid and in preparing itself to supply said water, expended up to January 1st, 1896, a considerable sum of money, but how much they have neither knowledge, information, or belief (and they deny that it is material or relevant that they should answer as to what sums of money were expended for such purposes).

And these defendants say that the right and title of said company to said reservoir and system for furnishing water therefrom to consumers for domestic, irrigation, and other purposes, and of impounding the same, and for the sale and distribution of the waters stored by it, and for collecting rates and compensation therefor, so acquired by it as aforesaid, are subject, nevertheless, to the water rights, easements in, and servitudes upon said reservoir and system, and to all other rights acquired by these defendants therein as aforesaid and annexed to the respective parcels of lands of these defendants.

Defendants each, except the defendants C. H. Rippey and M. L. Ward, admit that they are each the owners of tracts of land under the said water system of said land & town company, and that most of these defendants own and hold small tracts of only a few acres each, and they say that none of them owns to exceed twenty-five acres irrigated from said system, except Warren C. Kimball, who owns about seventy acres, and that each of said defendants owns his and her tract in severalty, except as follows: The defendants Edward Gulick, William Gulick, and Henry Gulick own twenty acres of land as tenants in common. The defendants  
24 J. M. Howe and H. O. Howe own twenty acres of land as tenants in common. The defendants Arthur Ryan and Michael Mack own ten acres as tenants in common; and the defendants F. E. Leslie and H. P. Whitner own ten acres as tenants in common.

These defendants admit, and each for himself and herself admits, that each defendant owning land as aforesaid has become the owner of a water right to a part of the water appropriated and stored by said company necessary to irrigate his and her said land.

And they say, and each says, that said water rights owned by the defendants respectively extend not only to the irrigation of the said respective tracts of land, but also to supplying the needs of persons resident and of animals kept thereon respectively.

And they say that each of their said water rights embraces the right and easements of the service of the reservoir and distributing system of said corporation for the delivery of the water at and upon their respective lands for all of said uses by the automatic gravity pressure existing under said system, and that each such water right and easement is in freehold and is a freehold servitude imposed upon said water system for the benefit of the land to which it is appurtenant, and that all claims and demands of said company for the price or compensation therefor has been paid or otherwise satisfied by purchase or otherwise as in the bill of complaint alleged.

And these defendants further say that said water rights extend to and include the right to have said corporation maintain said system efficiently to conduct the water to and deliver the same on the premises of each of the defendants for irrigation and other uses at and for the annual rates to be deemed and accepted as the legally established rates therefor under the facts hereinafter set forth.

25 And defendants admit that at the times mentioned in the bill of complaint the said company was furnishing them and each of them with water through its said system.

And these defendants say that of the said 12,000 acres of farming and orchard lands lying under said reservoir and within the reach of water supply therefrom the said corporation, in January, 1887, owned and for a long time prior, to wit, since the year 1869, had owned and held, for the purpose of sale, use, and profit, about seven thousand acres.

And, further answering, these defendants say that the lands of said corporation owned by it in January, 1887, as hereinbefore stated, irrigable from its said reservoir and distributing system, as so constructed, are situate in the Sweetwater valley, in Chula Vista and in National City, all within the boundaries of National ranch, in said city of San Diego; also in Otay valley, in said county, adjoining said National ranch on the south, and in the territory known as ex-Mission lands, adjoined to National City on the north, and that said lands, together with the said town lots owned by said company as aforesaid, *from* virtually one continuous tract, extending from near the base of the said Sweetwater reservoir westward to the bay of San Diego and from the Otay valley on the south to the municipal boundaries of the city of San Diego on the north and west thereof.

That the lands as owned in January, 1887, by others than the said company are in detached parcels scattered among said lands of the said company.

And they say that said lands of said corporation were, in January, 1887, entirely unsettled and in their wild and natural state, and were almost entirely arid and of but little value without water for irrigation.

That the said lands belonging to others than said company were also at said date largely unsettled and in their wild and natural state and were of the same general character with those of said company.

26 And these defendants say that the San Diego Land & Town

Company acquired its said water, water rights, reservoir site, reservoir, and distributing system for the purpose of devoting the same, first, to irrigate its own lands aforesaid and to supply the needs of inhabitants of said land who should be induced to purchase said lands from it as lands under irrigation and to be settled on said lands.

And that the object of said company in acquiring and constructing said water system was to enable it to sell its said lands as irrigated lands, with the easement of the perpetual flow and use of the water necessary and useful to irrigate the same, and to supply all the beneficial uses of the people who should settled upon them, annexed as appurtenants in freehold thereto, and to create the freehold servitudes upon its said water system corresponding to such easements.

And defendants aver that said water, water rights, and said water system, to the extent necessary and useful for the irrigation of the

lands of said company, became a part of said land and became merged in the estate of said company in said realty as one estate.

And they say that, subject to the foregoing purposes, the said San Diego Land & Town Company devoted and appropriated the remainder of its said water, water rights, and the capacity and service of its reservoir and whole water system to the sale, rental, and distribution of the use of water to the public.

And these defendants say that said land & town company, in part execution of its said first and primary purpose, object, and project for selling its own lands, laid out and platted its tract of lands known as Chula Vista, which consisted of about five thousand acres, in blocks of forty acres each, and bounded each such block by avenues and streets, and subdivided said blocks into lots of five acres

each and laid pipes through seven avenues therein, each 27 about three miles in length and separated from each other

one-fourth of a mile, and also piped said Chula Vista at right angles with said avenues at the distance of every mile in the street crossing said avenues, and by said means said company's distributing system was made sufficient to reach and serve with water each five-acre lot on said Chula Vista tract, and also reach its farming lands lying within the said city of National City, and extended pipes from its said system through said National City to serve and irrigate 390 acres of said ex-Mission lands outside and to the northward of the same, and that, in still further execution of said project, the said company laid pipes in the Sweetwater valley and elsewhere in National ranch, in the Otay valley, and in the tract known as ex-Mission, to reach and within reach of its said lands there situated.

And, further answering, these defendants say that nine-tenths of the said company's distributing pipe system aforesaid, when laid and ready for operation in February, 1888, was so laid in anticipation of future use and demand for water supply and not for any use or demand then existing, and that when laid it was, and to a great extent still is, ahead of the demands therefor, and that much thereof has laid unused.

And, further answering, the defendants say that from the time when said corporation entered upon the enterprise of constructing said water system it has at all times advertised in print and in writing subscribed by it and held its said farming and orchard lands for sale, and up to January 1st, 1896, did, as an inducement to the purchase thereof, both privately and publicly and continuously, in writing subscribed by it and otherwise, represent that the water of its said system was piped to and over said lands and lots, and was and would be supplied to purchasers thereof in abundance for irrigating the same at the rate of \$3.50 per acre per annum for farming and orchard lands.

And, further answering, these defendants say that the said 28 corporation, since the early portion of the year 1887 and up to January 1st, 1896, had at all times kept its said land continuously on the market for sale, with and under said representa-

tions as to water supply thereof and as to the annual rate for the same for irrigation.

And, further answering, these defendants say that the lands of said corporation situated in the Sweetwater valley, in the Otay valley, and in the ex-Mission, consisting of about 5,700 acres, without the appurtenant water supply under said system, have at no time been worth more, in case purchasers could be found, than an average of \$35.00 per acre, and that its land in Chula Vista, comprising about 5,000 acres, as aforesaid, as so laid out and platted, without the appurtenant water supply under said system, have at no time been worth more, in case purchasers could be found, but rather less, than an average of 75.00 per acre, and that its lands, other than town lots, situate within said city of National City, comprising about 900 acres, without the appurtenant water supply under said system, have at no time, in case purchasers could be found, been worth more, but rather less, than an average of \$100.00 per acre.

That by reason of said appurtenant water supply the said corporation regarded and treated the value of said lands and lots as proportionately enhanced, and that accordingly it has at all times since early in the year 1887 held its raw lands, including the annexed perpetual easement water supply from its said water system, in said Sweetwater valley, in said Otay valley, and in said ex-Mission, at an average of \$250.00 per acre, and has at all times held its raw lands in Chula Vista, with the said annexed water supply, at prices ranging from \$300.00 to \$500.00 per acre, except that it offered and sold about six five-acre tracts of its Chula Vista lands at \$150.00 per acre, as an inducement to the first few purchasers to locate thereon, and has at all times held its lands within said city of National City, together with the water supply annexed, at \$350.00 to \$500.00 per acre, and has held its lands, where improved by it with the aid of said appurtenant water supply, outside of the value of improvements on the same basis of valuation for the land and water.

And these defendants, further answering, say that, at said prices and under said representations that the annual rate for water for irrigation was and would be \$3.50 per acre, said corporation had, up to the date of the filing of the bill of complaint herein, sold to certain of the defendants and their predecessors in title, severally, parcels of said irrigated lands outside of National City aggregating about twelve hundred acres, with the freehold easement of water supply annexed as an incident and appurtenant to the land granted, and that in cases of the purchase of each such parcel of land each purchaser thereof respectively relied upon said representations of said corporation that the annual rate for water to be supplied for irrigation was and would remain not higher than \$3.50 per acre, and that in each case of such parcel of land so sold said corporation, prior to making its conveyance of the same to said purchasers, connected said lands with the actual flow of water from said system, both for irrigation and domestic and other uses, for persons and animals thereon, and in respect of lands in said Chula Vista so sold by said corporation that it exacted from and imposed upon

each of said purchasers of a tract from it his obligation to erect a residence house thereon at once, to cost not less than \$2,000.00.

And these defendants, further answering, say that up to December, 1892, said corporation made no express or separate grant of "water rights" as appurtenant to such of said land up to that time so sold by it to certain of these defendants, but granted the easement of the flow and use of water from its said system as an appurtenant of the land sold and granted with such land after

30 it had been connected with the said water system and after the said flow and supply of water had been applied to irrigate the land so sold and to the use of persons living and animals kept thereon, and contracted for and received compensation for the land and appurtenant water right in a single price for both.

That after December, 1892, said corporation in all cases where it sold of its said lands did, by an express contract in writing, specifically sell to those of the defendants who purchased lands from it after that date the appurtenant water right, and that each of such contracts contained the following provisions (the description of the land and the price for the same with water being adapted to each case), to wit:

"That in consideration of the stipulation herein contained, and the payment to be made, as hereinafter specified, the party of the first part," (said corporation) "hereby agrees to sell unto the party of the second part, and the party of the second part agrees to purchase of the party of the first part, the following real estate, to wit:" (Description.) "Together with a water right to the one-acre foot of water per annum for each and every acre of said above-described real estate, to be delivered by the party of the first part through its pipes and flumes at a point — said water to be used exclusively on said real estate, and to become and be appurtenant thereto, and not to be diverted therefrom. Provided, that the party of the first part may change the place of delivery of said water, so long as the same is near the highest point of said land. For which land and water right the party of the second part agrees to pay the sum of — dollars.

"And the party of the second part further agrees and binds —self — heirs, executors and assigns, to pay the regular annual water rates allowed by law and charged by the party of the first part for the water covered by said water rights, whether said water is used or not, and to pay for all water used on said land for domestic purposes, monthly, under such rules and regulations for the delivery of water to consumers as the party of the first part may from time to time make."

And these defendants say that in the character and quality of the appurtenant water rights connected with the land sold by said corporation, as aforesaid, no discrimination exists or has at any time been claimed by said corporation or has at any time been recognized by said purchasers between the lands so sold by it after the inauguration of said water system up to December, 1892, and those sold by it after that date with the express and specific provisions as hereinbefore set forth.

And these defendants, further answering, say that the title to the lands of certain of them, to the aggregate of about nine hundred acres, lying outside of said National City, was not derived from said corporation, and in respect to such lands they say that said corporation furnished water for the irrigation of so much of such land as came into cultivation up to December, 1892, without exacting a price for a water right, but voluntarily annexed the perpetual easement of the flow and use of water from said system to said lands, and voluntarily in all respects has from the beginning of its water service treated and still does treat the same as to water rights in all respects on the same footing as the lands sold by it to other of these defendants or their predecessors in interest, as hereinbefore alleged, and that from the beginning of its water service, in 1887, until now the annual water rates actually established and collected by said corporation for water furnished by it to land not sold by it have been the same as for water supplied to lands sold by it.

And defendants, further answering, say that from and after said date of December, 1892, said corporation refused to furnish water to irrigate other or further lands under said system not owned or sold

by it except upon the payment of a sum in gross for the water  
32 right over and above the uniform annual rate as actually  
established and collected from all lands under the system, or  
in lieu thereof of six per cent. annual interest upon its estimate of  
the value of such right.

That it first fixed the price of such water rights at \$50.00 per acre and later raised the same to \$100.00 per acre, and that after the same date of December, 1892, it furnished no water to irrigate any lands not sold by it except upon payment of the price fixed by it for a water right under a contract for the sale of such water right containing the following provisions (the filling of the blanks being adapted to each case), to wit:

"That the party of the first part (said corporation) agrees to and does hereby sell to the party of the second part a water right to one acre foot of water per acre per annum, for each and every acre of the real estate hereinafter described, to be delivered through the pipes and flumes of the party of the first part — for the sum of — dollars, payable as follows: —. Provided the party of the first part may at its option change the place of delivery of said water, so long as the same is near the highest point on the lands for which the water is delivered under and in accordance with the rules and regulations established from time to time by the party of the first part. Said water right is sold for the use of and to be appurtenant to the following-described real estate now owned by the party of the second part, in the county of San Diego, State of California, to wit: —, consisting of — acres.

"And it is expressly understood and agreed that the water right hereby sold shall belong to said described real estate and be used thereon, and not diverted therefrom or used on any other lands.

"In consideration of the foregoing stipulations and agreements, the party of the second part agrees and binds —self — heirs, exec-

utors and assigns, to pay the sums above specified promptly as the sums, and each of them, falls due, and that — will in all things comply with and perform the terms and conditions of this agreement on — part to be performed, and that — and they will promptly pay all annual water rates and charges for the water to which — is entitled under and by virtue of this agreement, at rates fixed by the party of the first part as allowed by law, and at the times, in the manner, and according to the rules and regulations made and adopted by the party of the first part, the annual rental for the amount of water to which the party of the second part is entitled under this contract, to be paid whether the same is used or not, and also to pay for all water used by — on said land for domestic purposes at the rates fixed by the party of the first part and allowed by law."

And that said company annexed, under said form of contract, the water rights referred to in the bill herein, which are appurtenant to about 400 acres of the lands of certain of these defendants.

And that said corporation at no time has made or claimed, and does not now make or claim, any distinction in respect of the character and quality of the water right or of the annual rates actually established or collected for irrigation between such of the said lands not purchased from it as are furnished with water for irrigation by it, whether under such special contract for water right or without.

And these defendants say that the defendant J. M. Ballou owns his water right, alleged in the complaint, by virtue of a special written contract with said corporation making such water right appurtenant to his land for a valuable consideration by him paid to said corporation and under the provisions as to rates in the words, to wit:

"Provided, that said party of the second part shall make application in the form provided by the company, for the use of 34 the water, and use the same under the same restrictions and conditions, and to pay said party of the first part the current rate therefor, as established, for Chula Vista; provided, said restrictions and conditions are not inconsistent with the water right hereby granted to said party of the second part."

And these defendants further say that of their number the owners of the lands to the amount of about 400 acres, which lie in said ex-Mission, and which have annexed to them water rights, as in the complaint alleged, entered into a written contract with said corporation for the use and flow of said water to said lands, and that said contract contains the following provisions:

"The parties of the first part will make application for the use of the water upon the form provided by the party of the second part for that purpose, and pay for the use of the water at the current rates as may be enforced from time to time for supplying lands in National ranch, and subject to the same general rules and regulations."

And, further answering, these defendants say that on or about June 3rd, 1895, said corporation established a classification of lands which had been or which should be provided with water by its system, to take effect July 1st, 1895, and afterwards confirmed the

same to take effect January 1st, 1896, and that said classification has been adopted by the complainant receiver and is in words following, to wit:

"Tenth. For the purpose of fixing rates for irrigating acre property the lands of that character are classified as follows:

"All lands to which the easement and flow of water for irrigation has been or shall be annexed by the consent or voluntary act of this company shall constitute the first class.

"All lands to which the easement and flow of water for irrigation has not been or shall not be annexed by the consent or voluntary act of this company shall constitute the second class."

35 And in respect of said second class of lands it at the same time promulgated the following, to wit:

"In addition to said annual rate for water used upon lands of said second class, there shall be paid upon the lands of said class an annual charge equal to six (6) per centum of the value of the right to said easement and flow of water for irrigation, which said value is to be taken as one hundred dollars (\$100.00) per acre."

And these defendants say that the lands of each and all of the defendants fall within the first class so defined by said corporation and said receiver.

And these defendants further say that said corporation has planted and improved other considerable tracts of its said lands still owned by it, aggregating about 1,500 acres, outside of said National City and about 75 acres within said city, and has used and is using thereon water supplied from its said system as appurtenant to said land and for cultivating the same, and also holds said lands, with such appurtenant easement of water supply, for sale, and that said corporation retains the remainder of its said lands under said system, comprising about 4,000 acres, to which water has not actually been applied, at valuations not less than hereinbefore stated for raw land, with the incident and easement of water supply annexed, and has refused and at all times refuses to dispose of the same without including said water supply, except on the conditions that purchasers would pay to complainant the price for said lands so fixed by it, and to include the price of a water right or interest at six per cent. per annum on the price of such water right, at the option of the purchaser.

And they further say that in estimating the annual income

36 from water rents under its system said corporation has, from the beginning of its said water supply, treated its said lands so actually irrigated by it as being precisely on the same footing as to annual rates with the lands of each of these defendants, and has entered up upon its books the same rate per acre per annum as chargeable to said lands as that charged to the lands of defendants, and that said receiver has done and does in all things do likewise.

And they say that in the classification aforesaid made by said corporation and its receiver no discrimination is made or at any time has been made between lands of the first and second class in respect of the annual rate, and that the said additional charge of six per cent. per annum upon the value of such water right applies

only to such lands as shall receive the use and flow of water from said system for irrigation upon demand of their owners to share in that part of the said waters appropriated by said corporation to the public use in the cases where the owners shall not have paid or secured to be paid, by contract or convention with said corporation, the gross sum demanded by it for the sale and conveyance of the water right for such lands, and they say that none of the lands of these defendants now under irrigation fall within the second class.

And these defendants say that they have each accepted and concurred in and do accept and concur in the said classification of lands as made by said corporation and receiver, and that the same has become established, and that the same is just, equitable, and reasonable as between said corporation and all the land-owners under said system.

And these defendants say that the aggregate number of acres of land now under irrigation from said system, including those of these defendants, of said corporation, and of all others, does not exceed

4,300 acres, or one-half of the capacity of the reservoir and  
37 distributing capacity of the main pipe lines of said corporation after allowing for the domestic uses of 20,000 persons, and that about 800 acres of said land so irrigated lie in National City.

And these defendants further say that neither of them know, and that neither of them has been informed, save by complainant's said bill and the statement of said corporation, what is the actual annual expense of operating and keeping in repair the said reservoir and water system of said company and furnishing its consumers with water, exclusive of the alleged interest of seven per centum of \$300,000.00 of the bonds of said corporation referred to in said bill, but that, upon such information, they are informed and believe, and therefore allege, that the said annual expenses do not exceed the sum of \$12,034.99, as stated in the bill of complaint herein.

And they aver that the "natural and necessary depreciation of its system" referred to in the bill of complaint is made good by the keeping of the same in repair, the cost of which is included in the annual charges, and they say that, as shown by the books of said corporation and its official reports, the aggregate, under the head of its accounting for "water service," "maintenance of pipe lines," "maintenance of Sweetwater dam," and "expenses" for the years ending December 31st, 1890, 1891, 1892, 1893, and 1894, were respectively \$8,015.48, \$13,002.46, \$11,395.17, \$11,410.48, and \$7,850.18.

And, answering upon such information, they allege that the amounts so actually realized from the whole system for water rentals alone, exclusive of any proceeds of the sale of water rights during said year, did not fall below \$25,715.00, and they say that at the same rates the amount that will be realized by said corporation from the annual rentals under said system, exclusive of any sums derived from the sale of water rights, will not, for the year ending January 1st, 1897, fall below \$27,000.00; and the defendants say and each

of them says that the amount of \$25,715.00 was collected as  
38 water rentals for the year ending January 1, 1896, for the  
several purposes for which water was used from the said com-  
pany's system, with the irrigation rate fixed at three and one-half  
dollars per acre per annum, and that the sum of twenty-seven thou-  
sand dollars is the measure of the yield for the year ending January  
1st, 1897, from the said rentals, with the rate for irrigation fixed at  
the same annual rate of \$3.50 per acre and with but two-thirds of  
the capacity of said system in use.

And they further say that the said amounts actually realized an-  
nually from water rents under said system are derived from sums  
paid in respect of the lands owned by others than the said corpora-  
tion and the rentals attributed to the lands owned by said corpora-  
tion actually under irrigation, and that no part thereof has at any  
time been derived from or attributed to the lands of said corporation,  
whether still owned by it or heretofore sold by it, so long as the same  
were not or still are not actually irrigated.

And defendants further say that they are informed by the records  
and official reports of said corporation, and therefore aver the fact  
to be, that on January 31st, 1894, the net balance of its actual re-  
ceipts from water rentals, based on collections actually made from  
lands actually irrigated, both those sold and those never owned by  
the company, and sums charged to lands owned by the company  
actually irrigated from February, 1888, to said December 31st, 1894,  
accumulated in its hands to the credit of said water system, after  
deducting the items of "expenses," "maintenance of pipe line," and  
"maintenance of Sweetwater dam," was \$49,699 28.

But they say that said net balance to the credit of said water com-  
pany's department on said December 31st, 1894, does not include  
any charge, rate, or assessment to the lands of said corporation which  
at any time were not or that now remain unirrigated.

39 And these defendants deny that the annual expenses of said  
corporation to operate and maintain its water system exceed  
the sum of \$12,034.99, as in the bill of complaint alleged.

But these defendants, further answering, say that they deny that  
said corporation is entitled to demand or receive from these defen-  
dants any sums whatever, by way of water rentals, in behalf of or to  
apply upon the said demanded income of six per cent. or any net  
income on the alleged cost of said water system.

And they deny that they or either of them own their said water  
rights in and under said water system subject to any obligation,  
legal or equitable, other than such as arises from the actual rates  
established, as aforesaid, and collected by said company, which, in  
case of their lands, is \$3.50 per acre per annum.

And they deny that the compensation to said corporation for  
either of their respective water rights, easements, or servitudes afore-  
said were or are still subject to regulation by any board of super-  
visors of this State, as provided in said act of 1885.

They aver that such of their number as have purchased their  
said lands, with water rights appurtenant thereto, from said corpora-  
tion and such of their number as have purchased of said corpora-

tion water rights made appurtenant to their lands, not bought of the corporation, have each and all paid the full amount demanded by said corporation as the price of the perpetual easement of water supply from said company's water system by said company granted and annexed to such lands. They aver that such easements are respectively servitudes upon said company's water system and have been fully paid for, and that the owners of said lands are forever discharged and acquitted from payment of any further sum or sums to apply on the principal of or as income upon the cost or value of said water system or any debt incurred by said corporation for construction thereof or the value of their respective water rights.

40 And they allege that said company, in each of said cases where water was devoted to the public use, received satisfaction for from and parted with to each of said defendants or to his or her predecessor in interest all right to demand and collect water rentals proportioned to said lands as corresponded or related to interest or income on the cost or value of said system or to net annual receipts and profits thereon or therefrom.

And that in said respects it has at all times put all other lands to which it has voluntarily annexed said water rights upon the same footing, and that all such lands have remained on the same footing for more than five years; that said lands have in many cases changed owners while so supplied with water at the same rates and on the same footing as to water rights with the land sold by the said company with annexed water rights, as aforesaid; that the value of said water rights has for more than five years entered into the market value of said lands and has in all cases been paid for to their vendors by the present owners, these defendants, who are successors in title by mesne or immediate conveyances of the lands to which, during the former ownership, the company voluntarily annexed said perpetual easement and water rights, and that neither any such lands nor the owners of any thereof are in any event liable for any other or further water rentals than are the lands the ownership of which, with said water rights, were derived from said corporation.

And these defendants, further answering, say that true it is, as alleged in the bill of complaint, that said land and town company commenced to furnish water to consumers in the year 1887; but they say that its regular water service commenced in the month of February, 1888.

They further say that true it is, as alleged in the bill of complaint, that said corporation did, as early as February, 1888,  
41 and as aforesaid, fix and establish and has since charged the rate of \$3.50 per acre as the annual rate for irrigation and no more until January 1st, 1896.

And these defendants each say that said annual rate of \$3.50 per acre is the only actual rate which has ever been established or that has ever been collected by said corporation or which has at any time been paid or assented to by the consumers under said system

from the said beginning of its water service down to the time of filing the bill of complaint herein.

That said rate so actually established and collected has during more than nine years last past been uniform as to all the lands actually irrigated under said system, and defendants say that it has been uniform and without discrimination in respect of all the lands of these defendants at all times.

And these defendants further say that they were induced to purchase, improve, and settle upon their said respective parcels of land in reliance upon the fact that said rates of \$3.50 per acre per annum for irrigation under said system has during all said period of time been uniformly and actually established and collected by said corporation; and they aver that said irrigation rate has entered into the value of all the land of these defendants and is a material element of such value.

They admit that no other person or corporation is or ever has been furnishing a supply of water to said defendants and other consumers, and that there is not now nor has been any other system of water works by which said defendants can be furnished with water.

And these defendants deny that the capacity of said water system is only sufficient to supply water to not exceed seven thousand acres, together with the water demanded for domestic use, and aver that it is of sufficient capacity to supply nine thousand acres, together with domestic uses of a population of twenty thousand persons.

42 And they deny that at the rate of \$3.50 per acre, if water should be demanded and used upon the whole of the lands which the system is able to supply with water, and rates are allowed in said National City equally high for domestic uses and irrigation, said company would not be able to pay its operating expenses and maintain from such rentals its plant and system. They deny that said company has been or still is under said established rates losing money every or any year. They deny that its said plant and system has been or is gradually going to decay from natural depreciation consequent upon its use in supplying consumers with water without any or sufficient resources or means provided from said rates for replacing the same. They deny that said company, if said rate of \$3.50 per acre is maintained, will be compelled to furnish water to consumers at any actual or continuous loss; and they deny that if the rentals derived from said system at the rates actually established and collected, including said rate of \$3.50 per acre, are fairly applied to manage, operate, and maintain the same that said system will be lost.

And these defendants deny and each of them denies that in order to pay the said company the amount of its annual expenses and an annual income of six per cent. upon the present cost and present value of its said water system it is necessary that the rates for water sold and consumed be so fixed as to realize to said company, when its system is wholly employed, the sum of \$119,791.66 or any less sum in excess of \$32,000.00 per annum.

And defendants aver that neither the present cost nor the present cash value of the whole of said property constituting said water system exceeds the sum of \$300,000.00, and that not over one-half of the capacity of said system was on January 1st, 1896, in use, and that not over two-thirds of the capacity of said system is now in use.

And defendants deny that in order to pay the cost of operating the plant of said company and maintaining the same and 43 pay said company as much as six per cent. net annual revenue upon the present cost and cash value of its said plant and water system it is or will be necessary to charge a rate per acre per annum of not less than \$7.00 for irrigation purposes or any sum in excess of \$3.50 per acre per annum for irrigation purposes in connection with the rate for water for domestic use under said system actually established and collected.

They deny that \$7.00 per acre per annum or any sum in excess of \$3.50 per acre per annum is a reasonable rate for these defendants as consumers to pay. They aver that each of them is owner of a right and easement in freehold of the flow and use of water through the water system of said company as in the bill of complaint alleged, and that the same is appurtenant to their respective lands, and that their lands fall within the first class established by said corporation, and that from them said company is not entitled to any interest on its investment in said plant, and they aver that the sum of \$3.50 per acre per annum for the use and enjoyment of said easement and maintaining and operating of said system has been actually established, as aforesaid, and is the only rate which has been collected by said corporation for the nine years last past from these defendants and their privies in the title to their said lands, and that no other rate has ever been actually established in respect of their lands or at any time collected, and that said rate is the ample and sufficient contribution of said lands for the maintenance of said works.

And these defendants aver that they and each of them respectively and their predecessors in estate, owners of the said several tracts of land now held and owned by the said defendants, have for more than five years prior to the first day of January, 1896, continuously held and enjoyed the use of the said waters upon their

44 said lands for irrigation purposes, paying therefor the annual sum of \$3.50 per acre, and that such use and enjoyment has been open, notorious, continuous, adverse, and uninterrupted, and that they have thereby acquired the right to have and enjoy said water for the purpose of irrigating their said lands, paying therefor the said annual sum per acre, and that said right has become vested in them by such use under the said deeds of conveyance and representations and assurances, as aforesaid, and by the operation of section 318 of the Code of Civil Procedure of the State of California, and that they are entitled to have and use the said water from the said works, paying therefor the said sum per acre per annum and no more.

And these defendants aver that the said corporation is barred from having or maintaining any action at law or in equity to change

the character of or add to the burden of said easement or to increase the said annual payment for the use of the said water, and is estopped to assert, claim, or exercise any right to change the said annual payment.

And the said defendants admit that by the laws of the State of California the board of supervisors may, upon the petition of twenty-five inhabitants and tax-payers of the county, fix the rates of the yearly rental to be collected by any company furnishing water to consumers when the same is furnished as a public use, and that no such petition has ever been presented or rates fixed in the case of said land & town company.

That admit that said land & town company gave notice to the defendants that on January 1st, 1896, it would undertake to establish a rental of \$7.00 per acre per annum for water supplied to their and each of their lands for irrigation, and that from and after said date it would undertake to require them and each of them to pay said sum for the irrigation of their and each of their lands, and they admit that complainant, after his alleged appointment as receiver and before said date, gave a similar notice.

And these defendants each say that at the date of said notices they were and for a long time prior thereto had been in the continued enjoyment of their said water rights and easements and the flow of the water thereunder, and were paying and always had paid to said company \$3.50 per annum for each acre irrigated by them and each of them.

And they say that said notice contained the further demand, as a condition to the refraining by said company from interfering with and shutting off the water supply of each of these defendants under their respective easements and water rights aforesaid, that the defendants each subscribe and execute an instrument upon a certain printed form designated "Application for water," which contained the following words and figures:

"NATIONAL CITY, CAL., — — —, 1896.

"To the San Diego Land & Town Company:

"The undersigned hereby applies for a permit to connect service pipes with the mains of the company and for water service under the rules and regulations of the San Diego Land & Town Company, which are expressly made the basis for the application, and which he agrees to observe for the following purposes and at the following rates for the year ending June 30th, 1896:

"No.	Monthly rate.	Annual rate.	Total.	Date.
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"Family of four persons.

"Additional persons.

"Bath.

"Water-closet.

"Horses.

"Horses.

"Carriages.

"Cows.

" "

" Lot and block property.

" Lots.

" "

" "

" Irrigated land.

46 " Acres.

" "

" Acres.

" Interest charges.

" Total annual rate for the year ending June 30, —, which I agree to pay, quarterly in advance, at the office of the San Diego Land & Town Company.

" The water to be furnished under this application to be used on the following land or property:

" Lot. In block. } sec.

" National City.

" National ranch.

" Ex-Mission.

" More fully described as follows:

" The location of the *top* is on — side of — avenue,  
street,  
between — and — avenues.

" This contract shall remain in force until the first day of next July, when it may be terminated at the request of either party, notice to be served in writing; but in case no such request is made, then the same shall continue in force for one year, thereafter, and so on from year to year until such request is made; which request, when made, shall be to terminate this contract on the following July first.

" Provided, that if the water is furnished under this application after June 30th, 1896, the same shall be paid for at the rate fixed by the proper authorities, or the rules of the company, for the year the same is furnished, and subject to the rules and regulations of the company, the same to be payable quarterly, unless otherwise provided by said rules and regulations.

" Applicant: — — .

" SAN DIEGO LAND & TOWN CO.,

" By — — ."

47 And these defendants admit that each of them has refused to pay said rate of \$7.00 per acre, and that they do maintain that neither the said land & town company nor the complainant has any legal or equitable right to increase the amount to be paid by any of them, and that the rate of \$3.50 per acre per annum actually established by the said land & town company by said contracts and conveyances, use, and practice, and which rate has at all times since the inauguration of said water system been collected and paid for the use of said water, must be and remain, and of right ought to be and remain, the established rate to be paid by these

defendants for such use as against the said attempt of said company and the complainant to raise the same to \$7.00 per acre per annum.

And defendants, further answering, allege that by the constitution of the State of California, adopted in 1879, it is provided in article XIV, section 1, among other things, as follows, to wit:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law."

"**SECTION 2.** The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereto, is a franchise and cannot be exercised except by authority of and in the manner prescribed by law."

And these defendants further aver that the legislature of the State of California, acting under and in pursuance of the said constitutional provisions, did, at its session held in 1885, pass an act entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in this State other than in the city, city and county, or town therein, and to secure the rights of way

for the conveyance of such water to the places of use," which said act was duly approved by the governor of the State of California on the 12th day of March, 1885, and by the said act it was provided that all water now appropriated or that might thereafter be appropriated for irrigation, sale, rental, or distribution is a public use, and the right to collect rates or compensation for uses of such water is a franchise, and, except when so furnished by any city, city and county, or town or the inhabitants thereof, should be regulated and controlled, in the counties of this State, by the several boards of supervisors thereof in the manner prescribed in the said act, and it was, among other things, provided in the fifth section of said act that in the regulation and control of such water rates for each of such persons, companies, associations, and corporations the said board of supervisors might establish different rates at which water might and should be sold, rented, or distributed, as the case might be, and that said rates, when so fixed by such board, should be binding and conclusive for not less than one year next after their establishment and until established anew or abrogated by such board of supervisors, as thereafter provided; and it was further provided in the same section that until such rates should be so established or after they should have been abrogated by such board of supervisors, as in the said act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations then furnishing or that should thereafter appropriate waters for sale, rental, or distribution to the inhabitants of any of the counties of this State should be deemed and accepted as the legally established rates thereof.

And they aver that said rate of \$3.50 per acre per annum established by said corporation, as set forth in the bill of complaint herein, is the only actual rate for irrigation which has ever been established and collected by said corporation or said receiver, and

they aver that the same is the only rate which ever has been legally established or which is to be deemed or accepted as having been legally established by said corporation therefor.

49. And these defendants deny that any increase of the rate for such rentals is at all necessary to enable said corporation or its receiver to maintain and operate said plant and pay the proper expenses of such maintenance and operation thereof.

They admit that in order to enforce the payment of said proposed rental of \$7.00 per acre per annum said complainant caused the water to be shut off from the premises of each of the said defendants until such demanded rentals should be paid, and they each deny that they or any of them threatened to commence suits in the superior court of the county of San Diego to compel complainant to turn on and furnish the water to their said lands or for damages.

They admit that their rights are the same to the extent that all are freehold easements, as aforesaid, and that the determination of the question of the right of said land & town company and of complainant to increase the rate of rental to be charged and collected will affect all of these defendants in the same way and to the same extent, except that the quantity of land owned by the several defendants is different.

And these defendants deny that all the questions involved in adjusting the rights of the parties in interest as involved in the controversies in this action can be better settled in one action.

They admit that the proposed increase in rates, if collected from all the lands irrigated under said system, including all those of defendants and all others, including those of the corporation itself, would add to the rentals collected by said company from all the said lands now under irrigation not less than \$14,000.00 per annum.

But the defendants each say, relating to the jurisdiction of 50 this court of the said action against each defendant severally, that on and for a long time prior to January 1st, 1896, there was in force a rule adopted by the San Diego Land & Town Company, which was also adopted by said complainant as its receiver, as follows :

"1. All rates are payable at the company's office, and in all cases, except where the supply is taken through a meter or counter, will be collected in advance and within — (15) days of becoming due, as follows : For miscellaneous and domestic purposes, January, July, and October 1st, in quarterly payments.

"6. In case of non-payment of the water rate within fifteen (15) days after becoming due the supply will be discontinued and will not be again renewed until full and satisfactory settlement of all arrearages shall be made, together with the sum of one dollar for turning on and off."

That under said rule, on January 4th, 1896, being the time of the filing of the bill of complaint herein, the demand of complainant for increase of rentals "to enforce payment" of which complainant caused the water to be shut off from the premises of each of these defendants until such demanded increase of rentals should be paid, as set forth and stated in the bill of complaint, was for the quarter

year beginning with January 1st, 1896, and no longer; that no rental or compensation of any kind had accrued or become due or payable to complainant at the filing of the bill herein except for the first quarter of said year.

That such demanded increase of rental for any quarter of the year beginning January 1st, 1896, would, in case of no defendant or defendants associated as partners, be as much as \$2,000.00, but in each case very much less than that sum, and in case of the defendant having the largest number of acres of land irrigated under said system would not equal \$58.00, and in case of no other as much as \$35.00, and of most others not to exceed \$3.75 each.

And these defendants, further answering, say that they  
51 have no information, except as derived from the complainant's  
bill, from the solemn admission of said corporation, and from  
the records of the recorder's office of the county of San Diego, State  
of California, as to whether said corporation did borrow \$300,000.00  
and as to whether it is compelled to pay thereon \$21,000.00 interest  
annually, or what portion of the said principal sum it applied to  
the acquisition and construction of its water system, and they  
deny that it is material for them to further answer any allegation  
with respect thereto.

And these defendants, further answering, say that they each have  
at all times since January 1, 1896, paid the rate or rental of \$3.50  
per acre per annum to the complainant, as such receiver, and are  
willing and offer to pay the same as long as it continues to be legally  
established.

And, further answering, these defendants say that the statute of  
the State of California of 1885 referred to in the bill of complaint  
and in this answer of these defendants, in so far as it purports to  
prohibit the said company from selling, disposing of, or alienating  
servitudes in freehold upon its said water system or its said prop-  
erty used or useful to the appropriation or furnishing of water, or  
to prohibit said company from contracting respecting the same, or  
from receiving full payment, satisfaction, or compensation therefor  
from any consumer willing to contract, purchase, and pay for the  
same, and in so far as said statute prescribes that such servitudes  
shall be enjoyed by the owner of the land to which the same are  
annexed as easements only upon the terms and conditions that  
such owners render net annual receipts and profits upon the value  
thereof in perpetuity, and in so far as said statute purports to pro-  
hibit said company and the consumers of water under it from the  
making of contracts by and between said company and water con-  
sumers respecting the annual receipts, profits, and income of any of  
said property, or to extinguish and satisfy and make acquit-

52 tance of any right of said company to such net annual receipts,  
profits, and income, and in so far as such statute prohibits  
any of the contracts in this answer set forth relating to the sale,  
transfer, or vesting of the flow and use of water in freehold annexed  
to the lands of the respective defendants herein, and in so far as it  
prohibits the sale, transfer, and vesting of the ownership of the  
water rights in the bill of complaint referred to in these defendants

respectively and from becoming annexed to their respective parcels of land, the same is unconstitutional and void as being in conflict with the XIV amendment of the Constitution of the United States, in that such statute would deprive said company and these defendants of their liberty without due process of law and would deny to them and each of them the equal protection of the laws, and as being in conflict with the declaration of rights contained in section one of the constitution of the State of California, and which said section is in words and figures following to wit:

*"Article 1, Declaration of Rights—Inalienable Rights.*

"SECTION 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life, liberty and property, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."

And as being in conflict with article twenty, section nine, of the constitution of the State of California, which is as follows:

"SECTION 9. No perpetuities shall be allowed, except for eleemosynary purposes."

And each defendant for himself says that his liability to pay rentals or charges of any kind for the service of said system is several and not joint, except only in the case of said defendants associated as partners, which is joint only as between such partners.

And the defendants say that the following defendants, 53 among others, are not inhabitants or residents of the State of California and are not competent to make petition to the board of supervisors, as provided in section 3 of said act of 1885, to wit:

T. M. Eaton, Charles Mohnike, the heirs of Schulenburg, deceased; E. J. Elliott, H. E. Klamer, D. S. McBean, Edwin S. Belcher, J. W. Stearns, N. J. Pillsbury, Mary D. Klamer, Arthur Ryan and Michael Mack, L. V. Wright.

And they say that the following-named defendants are public-school corporations and not tax-payers of any county of this State:

Chula Vista School District, Sunnyside School District, Sweetwater School District, and for said reasons are not competent to make such petition.

And the following-named defendants, among others, are not inhabitants of said county of San Diego, to wit: Edward Gulick, William Gulick, and J. O. Rhinehart, and for said reasons are not competent to make such petition.

And said defendants, so being incompetent to petition the board of supervisors, as provided by section 3 of said act of 1885, say and all the defendants say that they have no power to compel any sufficient number of competent inhabitants who are tax-payers to join in a petition to the board of supervisors, as provided in said section 3 of said act.

And these defendants say that said statute of the State of California approved March 3rd, 1885, in so far as it assumes or purports

to authorize or empower said San Diego Land & Town Company or said receiver to increase, as is alleged in the bill of complaint, said rate of \$3.50 per acre per annum heretofore actually established and collected from the defendants without the consent of the defendants and each of them, is in violation of section one of article XIV of the amendments of the Constitution of the United States, and deprives each of them of his and her property without due process of law and denies to each of them the equal protection of the law.

54 And these defendants further say that, in so far as said statute of 1885 purports to authorize or empower said land & town company or its receiver to shut off or to justify them or either of them in their act, as set forth in the bill of complaint, in shutting off the water from the lands of these defendants or either of them, or to deprive these defendants or either of them of the enjoyment of their said water rights and of their said easement of the flow and use of such water for the irrigation of their said respective tracts of land as a means of enforcing against these defendants the collection of the increase of rental demanded in the bill of complaint or any increase made without consent of these defendants of the said rate of \$3.50 per acre per annum heretofore actually established and collected from these defendants, and in so far as said statute purports to permit or authorize such enforced collection without permitting these defendants to have any standing in this court to contest the reasonableness of said increase of rates, and in so far as it purports to empower this court or any court to enjoin these defendants or any of them from contesting the reasonableness of said increase of rates in any court, the same is unconstitutional and void as tending to deprive and depriving these defendants and each of them of their property without due process of law and as tending to deprive and depriving them and each of them of the equal protection of the laws, in violation of section one of the XIV amendment of the Constitution of the United States.

And these defendants humbly submit and insist that the rate of rental for irrigation of each of their said parcels of land ought not to be changed or altered from the rate of \$3.50 per acre per annum, being the rate and rent actually established and collected by said San Diego Land & Town Company and said receiver, as aforesaid.

And, further answering, these defendants admit that the complainant, C. D. Lanning, was appointed receiver of all the 55 property of the said San Diego Land & Town Company of Kansas by the circuit court of the United States for the district of Massachusetts at the time and with the powers as in the bill of complaint alleged, and that said receiver took possession of said property and of the management thereof as such receiver.

And these defendants aver and each of them avers that the acts of said receiver, as set forth in the bill of complaint, in undertaking to raise the said rate of \$3.50 per acre per annum for irrigation to \$7.00, and in shutting off the water supply, as in the bill of complaint alleged, are and each of them is in violation of article V of the amendments to the Constitution of the United States, as acts

done under a color of authority of the United States, tending to deprive and depriving these defendants and each of them of their property without due process of law.

And these defendants, as matter of supplement to their said answer, state that the legislature of the State of California, at the session thereof held in 1897, passed an act entitled "An act to amend an act entitled 'An act to regulate and control the sale, rental, and distribution of appropriated water in this State other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use,' approved March 12th, 1885, by inserting a new section therein relating to contracts for the sale, rental, and distribution of water, and the sale or rental of easements and servitudes of the right to the flow and use of water," and which said act was duly approved by the governor of the State of California on the 13th day of March, 1897, and thereupon immediately went into effect.

And defendants further aver that the addition so by the said amendment made to the said act was a section numbered 11 $\frac{1}{2}$ , and which said section is in the words following, to wit:

"SECTION 11 $\frac{1}{2}$ . Nothing in this act contained shall be construed as prohibiting or invalidating any contract already made, or which shall be hereafter made, by or with any of the persons, companies, associations or corporations described in section two of this act, relating to the sale, rental or distribution of water or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract."

And these defendants further aver upon information and belief that by virtue of the said provisions of the Constitution of the United States and of the State of California and under and by virtue of the act of the legislature of March 13, 1897, before mentioned, these defendants and each of them had the right to enter into the contracts with the said San Diego Land & Town Company herein set forth, and the said contracts are valid and effectual, and that the said complainant had no right to make such increased charge for the use of water as aforesaid.

And these defendants deny that any other matter or thing in the said bill of complaint contained and not herein and hereby well and sufficiently answered unto, confessed and avoided, traversed or denied, is true, to the knowledge or belief of them or either of them.

All which matters and things these defendants are ready to aver, prove, and maintain as this honorable court shall direct, and pray to be hence dismissed with their costs and charged in this behalf most wrongfully sustained.

JOHN S. CHAPMAN,  
C. H. RIPPEY, AND  
HAINES & WARD,  
*Solicitors for said Defendants.*

STATE OF CALIFORNIA, ]  
*County of San Diego,* }<sup>ss:</sup>

D. L. Murdock, being first duly sworn, deposes and says:  
 57 That I am one of the defendants named in the foregoing-  
 entitled further answer; that I have read said further answer  
 and know the contents thereof, and that the same is true of my own  
 knowledge, except as to the matters which are therein stated upon  
 information and belief, and as to these matters I believe it to be  
 true.

D. L. MURDOCK.

Subscribed and sworn to before me this 11th day of September,  
 A. D. 1898.

[SEAL.]

DAVID C. COLLIER,  
*Notary Public in and for the County of  
 San Diego, State of California.*

That pursuant to the written stipulation of the parties to said action, filed September 13, 1897, an order was entered by the court on Dec. 20, 1897, *nunc pro tunc*, as of the 13th day of September, 1897, that the oath of any one of the defendants to the joint and several answers of the defendants shall be treated as the oath of all, and that the answers shall be treated as though sworn to by all.

That to the said answer so filed the said complainant, Chas. D. Lanning, receiver of said San Diego Land & Town Company of Kansas, filed, on September 22, 1897, the exceptions in words and figures as follows, to wit:

(Title of Cause.)

*Exceptions Taken by said Complainant to the Answer of the said  
 Defendants to His Bill of Complaint in This Cause.*

First. For that said defendants have not according to the best of their information, knowledge, and belief set forth and discovered in their answer relevant and material matters of facts showing or tending to show that the matters alleged in the complainant's said bill of complaint are not true or in confession and avoidance thereof, but instead thereof have set forth in their said answer immaterial, irrelevant, and impertinent matter, and particularly 58 the following allegations contained and set forth in said answer, to wit:

1. That part thereof commencing with the word "They," in line 4, page 4, of said answer, as follows:

"They deny that said corporation is or at any time was the owner of any water or water rights or reservoir or any water system, as alleged in the bill of complaint, except as hereinafter set forth, or that it is or at any time was the owner of any water or water rights or reservoir or any water system for or devoted to any purpose except as hereinafter set forth."

2. That part thereof commencing with the word "And," in line 15, page 4, of said answer, as follows:

"And they say that said dam and reservoir are entirely on land constituting part of the bed of the Sweetwater river and on riparian land on both sides of said river contiguous thereto."

3. That part thereof commencing with the word "That," in line 19, page 4, of said answer, as follows:

"That said corporation became the owner in fee-simple of the ground occupied by its dam, reservoir, pipe lines, and conduits and all the real estate occupied by its water system by private grants to it from the owners thereof holding by mesne conveyances from the owners of the Mexican grants in said San Diego county, known as the Rancho de la Nacion and the Jamacha rancho; that it acquired the title to all the said land occupied by its reservoir prior to 1886 except a tract of three hundred and fifty-five acres in the extreme upper end of the reservoir, which it acquired in 1891 by grant to it from George H. Neale and wife, the then owners.

"That said Rancho de la Nacion contains 26,631.94 acres of land and has its western boundary on San Diego bay, a navigable water of the Pacific ocean, from whence it extends eastward about seven miles, and that the patent for said rancho was duly issued by the

United States Government on February 27, 1866.

59 "That said Jamacha rancho adjoins said Rancho de la Nacion on the east and contains two square leagues of land; that the said grant was duly confirmed by the district court of the United States for California on March 9, 1858, and that the United States duly issued a patent conformably thereto.

"That the said Sweetwater river flows westerly through said Jamacha rancho, and, pursuing the said course, passes from it into said Rancho de la Nacion, and, flowing nearly through the center of said last-named rancho for about seven miles, has its mouth therein, where it empties into San Diego bay at the western boundary of said last-named rancho.

"That on the 9th day of June, 1869, Frank A. Kimball and Warren C. Kimball were, and for a long time prior thereto had been, the owners in fee of said National rancho and of all and singular the bed of the said Sweetwater river and of all the land on each side thereof and contiguous thereto in said Rancho de la Nacion from the eastern boundary thereof, being also the western boundary of said Jamacha rancho, downward, along and upon the said Sweetwater river to the place where it empties into the bay of San Diego.

"That afterwards, as early as the year 1881, said company acquired the title in fee of all the waters then flowing and thereafter to flow in said Sweetwater river in and through said Rancho de la Nacion, with the right to divert the same from its natural channel at any point or points in said rancho, by a regular chain of mesne grants and conveyances under a grant and conveyance of the same made by said Frank A. Kimball and Warren C. Kimball on said 9th day of June, 1869.

"That by reason of the premises the said company became the owner in fee-simple of all the water in and riparian rights on the said Sweetwater river and of the bed of said river from the highest

flowage point of its reservoir in said Jamacha rancho down to  
60 said San Diego bay, and that it acquired such ownership  
prior to the year 1886, except as to that portion thereof at  
the extreme upper end of said reservoir acquired from said Neale  
and wife in 1891, as aforesaid."

4. That part thereof commencing with the word "That," in line  
5, page 6, of said answer, as follows:

"That pursuant to the provisions of title VIII of the Civil Code  
of California said company caused to be posted and recorded in Book  
One (1) of the Record of Water Claims for San Diego County no-  
tices each respectively of the appropriation of 5,000 inches of water  
of said Sweetwater river at the location of said dam; one of said  
notices in the month of September, 1886, recorded at page 171; one  
in the month of September, 1887, recorded at page 178; one in the  
month of April, 1887, recorded at page 248; all in said Book One (1).

"That each of said notices contained in the designation of the  
purposes for which the said water was claimed *for the words follow-*  
*ing, to wit:*

"The purposes for which said undersigned claims said water are  
to supply for culinary and irrigation purposes, the watering of live  
stock, and other domestic uses to the lands north and south of the  
Sweetwater river and adjacent thereto.

"That in the month of August, 1888, said company in its own  
name posted and filed for record a notice of appropriation of 75,000  
inches of continuous flow of said Sweetwater river for the purposes  
set forth in said notice in words following, to wit:

"The purposes for which said water is claimed *is to divert and*  
*distribute the same through pipes, flumes, ditches for the purpose*  
*of irrigation, domestic, manufacturing, and such other uses and pur-*  
*poses as may be practicable and expedient.*

"But defendants aver that at the time of the filing and recording  
of each of said notices of appropriation and of the commencement  
of the construction of said irrigation system the riparian land on said

Sweetwater river and tributaries and the beds thereof above  
61 said reservoir were substantially all in private ownership,  
and almost none of said riparian land or beds of the streams  
were public lands of the State of California or the United States."

5. That part thereof commencing with the word "That," in line  
10, page 7, of said answer as follows:

"That the location of said dam is across the channel of said Sweet-  
water river at a point within the boundaries of said Rancho de la  
Nacion about one-fourth of a mile west from the eastern boundary  
thereof, and is so located that the whole reservoir capable of being  
filled by the same is on lands so acquired by said company in said  
Rancho de la Nacion and Jamacha rancho.

"That the capacity of said reservoir is six thousand million gal-  
lons, and that the water system of said company covers and can  
supply about 9,000 acres of the 12,000 acres of territory thereunder,  
consisting of certain farming lands within and outside of said Na-  
tional City; and, in addition to supplying said 9,000 acres, can  
supply the domestic uses and needs of a population, when settled

upon said lands within and without said National City and on village property within said city, of 20,000 persons."

6. That part thereof commencing with the word "And," in line 29, page 7, of said answer as follows:

"And they deny that it is material or relevant that they should answer as to what sums of money were expended for such purposes."

7. That part thereof commencing with the word "Defendants," in line 8, page 8, of said answer as follows:

"Defendants each, except the defendants C. H. Rippey and M. L. Ward, admit that they are each the owners of tracts of land under the said water system of said land & town company, and that most of these defendants own and hold small tracts of only a few acres each, and they say that none of them own to exceed twenty-five acres irrigated from said system, except Warren C. Kimball, who owns about seventy acres, and that each of said defendants owns his and her tract in severalty, except as follows: The defendants Edward Gulick, William Gulick, and Henry Gulick own twenty acres of land as tenants in common, the defendants J. M. Howe and H. O. Howe own twenty acres of land as tenants in common, the defendants Arthur Ryan and Michael Mack own ten acres as tenants in common, and the defendants F. E. Leslie and H. P. Whitner own ten acres as tenants in common."

8. That part thereof commencing with the word "And," in line 1, page 9, of said answer as follows:

"And that each such water right and easement is in freehold and is a freehold-servitude imposed upon said water system for the benefit of the land to which it is appurtenant, and that all claims and demands of said company for the price or compensation therefor has been paid or otherwise satisfied by purchase or otherwise, as in the bill of complaint alleged."

9. That part thereof commencing with the word "Under," in line 13, page 9, of said answer as follows:

"Under the facts hereinafter set forth."

10. That part thereof commencing with the word "And," in line 18, page 9, of said answer as follows:

"And these defendants say that, of the said 12,000 acres of farming and orchard lands lying under said reservoir and within the reach of water supply therefrom, the said corporation, in January, 1887, owned, and for a long time prior, to wit, since the year 1869, had owned and held, for the purpose of sale, use, and profit, about seven thousand acres.

"And, further answering, these defendants say that the lands of said corporation owned by it in January, 1887, as hereinbefore stated, irrigable from its said reservoir and distributing system, as so constructed, are situate in the Sweetwater valley, in Chula Vista, and

in National City, all within the boundaries of National ranch, 63 in said city of San Diego; also in Otay valley, in said county, adjoining said National ranch on the south, and in the territory known as ex-Mission lands, adjoined to National City on the north, and that said lands, together with the said town lots owned

by said company as aforesaid, form virtually one continuous tract extending from near the base of the said Sweetwater reservoir westward to the bay of San Diego and from the Otay valley on the south to the municipal boundaries of the city of San Diego on the north and west thereof.

"That the lands, as owned in January, 1887, by others than the said company are in detached parcels scattered among said lands of the said company."

"And they say that said lands of said corporation were in January, 1887, entirely unsettled and in their wild and natural state, and were almost entirely arid and of but little value without water for irrigation.

"That the said lands belonging to others than said company were also at said date largely unsettled and in their wild and natural state, and were of the same general character with those of said company.

"And these defendants say that the said San Diego Land & Town Company acquired its said water, water rights, reservoir site, reservoir and distributing system for the purpose of devoting the same, first, to irrigate its own lands aforesaid and to supply the needs of inhabitants of said land who should be induced to purchase said lands from it as lands under irrigation and to settle on said lands.

"And that the object of said company in acquiring and constructing said water system was to enable it to sell its said lands as irrigated lands, with the easements of the perpetual flow and use of the water necessary and useful to irrigate the same, and to supply all the beneficial uses of the people who should settle upon them, annexed as appurtenants in freehold thereto, and to create the freehold servitudes upon its said water system corresponding to such easements.

64 "And defendants aver that said water, water rights, and said water system, to the extent necessary and useful for the irrigation of the lands of said company, became a part of said land and became merged in the estate of said company in said realty as one estate.

"And they say that, subject to the foregoing purposes, the said San Diego Land & Town Company devoted and appropriated the remainder of its said water, water rights, and the capacity and service of its reservoir and whole water system to the sale, rental, and distribution of the use of water to the public. .

"And these defendants say that said land & town company, in part execution of its said and first primary purpose, object, and project for selling its own lands, laid out and platted its tract of lands known as Chula Vista, which consisted of about five thousand acres, in blocks of forty acres each, and bounded each such block by avenues and streets, and subdivided said blocks into lots of five acres each, and laid pipes through seven avenues therein, each about three miles in length and separated from each other one-fourth of a mile, and also pipes said Chula Vista at right angles with said avenues at the distance of every mile in the street crossing said avenue, and by said means said company's distributing system was

made sufficient to reach and serve with water each five-acre lot on said Chula Vista tract.

"And also reach its farming lands lying within the said city of National City, and extended pipes from its said system through said National City to serve and irrigate 390 acres of said ex-Mission lands outside and to the northward of the same, and that, in still further execution of said project, the said company laid pipes in the Sweetwater valley and elsewhere in National ranch, in the Otay valley, and in the tract known as ex-Mission, to reach and within reach of its said lands there situated.

65 "And, further answering, these defendants say that nine-tenths of the said company's distributing-pipe system aforesaid, when laid and ready for operation in February, 1886, was so laid in anticipation of future use and demand for water supply and not for any use or demand then existing, and that when laid it was, and to a great extent still is, ahead of the demands therefor, and that much thereof has laid unused."

11. That part thereof commencing with the word "And," in line 5, page 12, of said answer as follows:

"And, further answering, the defendants say that from the time when said corporation entered upon the enterprise of constructing said water system it has at all times advertised in print and in writing subscribed by it and held its said farming and orchard lands for sale, and up to January 1st, 1896, did, as an inducement to the purchase thereof, both privately and publicly and continuously, in writing subscribed by it and otherwise, represent that the water of its said system was piped to and over said lands and lots and was and would be supplied to purchasers thereof in abundance for irrigating the same at the rate of \$3.50 per acre per annum for farming and orchard lands."

12. That part thereof commencing with the word "And," in line 16, page 12, of said answer as follows:

"And, further answering, these defendants say that the said corporation since the early portion of the year 1887 and up to January 1st, 1896, had at all times kept its said lands continuously on the market for sale, with and under said representations as to water supply thereof and as to the annual rate for the same for irrigation."

13. That part thereof commencing with the word "And," in line 22, page 12, of said answer as follows:

"And, further answering, these defendants say that the lands of said corporation situated in the Sweetwater valley, in the Otay valley, and in the ex-Mission, consisting of about 5,700 acres, without 66 out the appurtenant water supply under said system, have at no time been worth more, in case purchasers could be found, than an average of \$35.00 per acre, and that its lands in Chula Vista, comprising about 5,000 acres, as aforesaid, as so laid out and platted, without the appurtenant water supply under said system, have at no time been worth more, in case purchasers could be found, but rather less, than an average of \$75.00 per acre, and that its lands other than town lots situated within said city of National City, comprising about 900 acres, without the appurtenant

water supply under said system, have at no time, in case purchasers could be found, been worth more, but rather less, than an average of \$100.00 per acre.

"That by reason of said appurtenant water supply the said corporation regarded and treated the value of said lands and lots as proportionately enhanced, and that accordingly it has at all times since early in the year 1887 held its raw lands, including the annexed perpetual easement water supply from its said water system, in said Sweetwater valley, in said Otay valley, and in said ex-Mission, at an average of \$250.00 per acre, and has at all times held its raw lands in Chula Vista, with the said annexed water supply, at prices ranging from \$300.00 to \$500.00 per acre, except that it offered and sold about six five-acre tracts of its Chula Vista lands at \$150.00 per acre as an inducement to the first few purchasers to locate thereon, and has at all times held its lands within said city of National City, together with the water supply annexed, at \$350.00 to \$500.00 per acre, and has held its lands, where improved by it with the aid of said appurtenant water supply, outside of the value of improvements, on the same basis of valuation for the land and water."

14. That part thereof commencing with the word "And," in line 21, page 13, of said answer as follows:

"And these defendants, further answering, say that, at said prices and under said representations that the annual rate for water for irrigation was and would be \$3.50 per acre, said corporation 67 had, up to the date of the filing of the bill of complaint herein, sold to certain of the defendants and their predecessors in title severally parcels of said irrigated lands outside of National City aggregating about twelve hundred acres, with the freehold easement of water supply annexed as an incident and appurtenant to the land granted, and that in cases of the purchase of each such parcel of land each purchaser thereof respectively relied upon the said representations of said corporation that the annual rate for water to be supplied for irrigation was and would remain not higher than \$3.50 per acre, and that in each case of such parcel of land so sold said corporation, prior to making its conveyance of the same to purchasers, connected said lands with the actual flow of water from said system, both for irrigation and domestic and other uses for persons and animals thereon, and, in respect of lands in said Chula Vista so sold by said corporation, that it exacted from and imposed upon each of said purchasers of a tract from it his obligation to erect a residence house thereon at once to cost not less than \$2,000.00."

15. That part thereof commencing with the word "And," in line 10, page 14, of said answer as follows:

"And these defendants, further answering, say that up to December, 1892, said corporation made no express or separate grant of 'water rights' as appurtenant to such of said land up to that time so sold by it to certain of these defendants, but granted the easement of the flow and use of water from its said system as an appurtenant to the land sold and granted with such land after it had

been connected with the said water system and after the said flow and supply of water had been applied to irrigate the land so sold and to the uses of persons living and animals kept thereon, and contracted for and received compensation for the land and appurtenant water right in a single price for both.

68 "That after December, 1892, said corporation, in all cases where it sold of its said lands, did, by an express contract in writing, specifically sell to those of the defendants who purchased lands from it after that date the appurtenant water right, and that each of such contracts contained the following provisions (the description of the land and the price for the same, with the water, being adapted to each case), to wit:

"That in consideration of the stipulation herein contained, and the payment to be made, as hereinafter specified, the party of the first part, (said corporation) hereby agrees to sell unto the party of the second part, and the party of the second part agrees to purchase of the party of the first part, the following real estate, to wit:" (Description) "Together with a water right to the one-acre foot of water per annum for each and every acre of said above-described real estate, to be delivered by the party of the first part through its pipes and flumes at a point — said water to be used exclusively on said real estate, to become and be appurtenant thereto, and not to be diverted therefrom. Provided, that the party of the first part may change the place of delivery of said water, so long as the same is near the highest point of land. For which land and water right the party of the second part agrees to pay the sum of — dollars.

"And the party of the second part further agrees and binds —self — heirs, executors and assigns, to pay the regular annual water rates allowed by law and charged by the party of the first part for the water covered by said water rights, whether said water is used or not, and to pay for all water used on said land for domestic purposes, monthly, under such rules and regulations for the delivery of water to consumers as the party of the first part may from time to time make.

"And these defendants say that in the character and quality of the appurtenant water rights connected with the land sold by said corporation, as aforesaid, no discrimination exists or has at 69 any time been claimed by said corporation or has at any time been recognized by said purchasers between the lands so sold by it after the inauguration of said water system up to December, 1892, and those sold by it after that date with the express and specific provisions as hereinbefore set forth."

16. That part thereof commencing with the word "And," in line 28, page 15, of said answer as follows:

"And these defendants, further answering, say that the title to the lands of certain of them, to the aggregate of about nine hundred acres, lying outside of said National City, was not derived from said corporation; and in respect of such lands they say that said corporation furnished water for the irrigation of so *many* of such land as came into cultivation up to December, 1892, without exacting a price for a water right, but voluntarily annexed the perpetual ease-

ment of the flow and use of water from said system to said lands, and voluntarily, in all respects, has from the beginning of its water service treated and still does treat the same as to water rights in all respects on the same footing as the lands sold by it to other of these defendants or their predecessors in interest, as hereinbefore alleged, and that from the beginning of its water service, in 1887, until now the annual water rates actually established and collected by said corporation for water furnished by it to land not sold by it have been the same as for water supplied to lands sold by it."

17. That part thereof commencing with the word "And," in line 14, page 16, of said answer as follows:

"And defendants, further answering, say that from and after said date of December, 1892, said corporation refused to furnish water to irrigate other or further lands under said system not owned or sold by it except upon the payment of a sum in gross for the water right over and above the uniform annual rate as actually established and collected from all lands under the system, or, in line thereof,  
70      of six per cent. annual interest upon its estimate of the value of such right.

"That it first fixed the price of such water rights at \$50.00 per acre, and later raised the same to \$100.00 per acre, and that after the same date of December, 1892, it furnished no water to irrigate any lands not sold by it except upon payment of the price fixed by it for a water right under a contract for the sale of such water right containing the following provisions (the filling of the blanks being adapted to each case), to wit:

"That the party of the first part (said corporation) agrees to and does hereby sell to the party of the second part a water right to one acre foot of water per acre per annum, for each and every acre of the real estate hereinafter described, to be delivered through the pipes and flumes of the party of the first part for the sum of — dollars, payable as follows: — ; provided the party of the first part, may, at its option, change the place of delivery of said water, so long as the same is near the highest point on the lands for which the water is delivered under and in accordance with the rules and regulations established from time to time by the party of the first part. Said water right is sold for the use of and to be appurtenant to the following-described real estate now owned by the party of the second part, in the county of San Diego, State of California, to wit: —, consisting of — acres.

"And it is expressly understood and agreed that the water right hereby sold shall belong to said described real estate and be used thereon, and not diverted therefrom or used on any other lands.

"In consideration of the foregoing stipulations and agreements, the party of the second part agrees and binds —self, —heirs, executors and assigns, to pay the sums above specified promptly as the sums, and each of them falls due, and that — will in all things comply with and perform the terms and conditions of this agree-

71      ment on — part to be performed, and that — and they will promptly pay all annual water rates and charges for the water to which — is entitled under and by virtue of this

agreement at rates fixed by the party of the first part as allowed by law, and at the times, in the manner, and according to the rules and regulations made and adopted by the party of the first part, the annual rental for the amount of water to which the party of the second part is entitled under this contract, to be paid whether the same is used or not, and also to pay for all water used by — on said land for domestic purposes at the rates fixed by the party of the first part and allowed by law.

"And that said company annexed under said form of contract the water rights referred to in the bill herein, which are appurtenant to about 400 acres of the lands of certain of these defendants.

"And that said corporation at no time has made or claimed and does not now make or claim any distinction in respect of the character and quality of the water right or of the annual rates actually established or collected for irrigation between such of the said lands not purchased from it as are furnished with water for irrigation by it, whether under such special contract for water right or without.

"And these defendants say that the defendant J. M. Ballou owns his water right, alleged in the complaint, by virtue of a special written contract with said corporation making such water right appurtenant to his land for a valuable consideration by him paid to said corporation and under the provisions as to rates in the words, to wit:

"Provided, that said party of the second part shall make application in the form provided by the company, for the use of the water, and use the same under the same restrictions and conditions, and to pay said party of the first part the current rate therefor, as established for Chula Vista; provided, said restrictions and  
72 conditions are not inconsistent with the water right hereby granted to said party of the second part."

"And these defendants further say that of their number the owners of the lands to the amount of about 400 acres, which lie in said ex-Mission and which have annexed to them water rights, as in the complaint alleged, entered into a written contract with said corporation for the use and flow of said water to said lands, and that said contract contains the following provisions:

"The parties of the first part will make application for the use of the water upon the form provided by the party of the second part for that purpose, and pay for the use of the water at the current rates as may be enforced from time to time for supplying lands in National ranch, and subject to the same general rules and regulations."

18. That part thereof commencing with the word "And," in line 2 of page 19 of said answer, as follows:

"And, further answering, these defendants say that on or about June 3rd, 1895, said corporation established a classification of lands which has been or which should be provided with water by its system to take effect July 1st, 1895, and afterwards confirmed the same to take effect January 1st, 1896, and that said classification

has been adopted by the complainant receiver and is in words following, to wit:

"Tenth. For the purpose of fixing rates for irrigating acre property, the lands of that character are classified as follows:

"All lands to which the easement and flow of water for irrigation has been or shall be annexed by the consent or voluntary act of this company shall constitute the first class.

"All lands to which the easement and flow of water for irrigation has not been or shall not be annexed by the consent or voluntary act of this company shall constitute the second class."

"And in respect of said second class of lands it at the same time promulgated the following, to wit:

"In addition to said annual rate for water used upon  
73 lands of said second class there shall be paid upon the lands  
of said class an annual charge equal to six (6) per centum of  
the value of the right to said easement and flow of water for irri-  
gation; which said value is to be taken as one hundred dollars  
(\$100.00) per acre."

"And these defendants say that the lands of each and all of the defendants fall within the first class so defined by said corporation and said receiver."

19. That part thereof commencing with the word "And," in line 28 of page 19 of said answer, as follows:

"And these defendants further say that said corporation has planted and improved other considerable tracts of its said lands still owned by it, aggregating about 1,500 acres outside of said National City and about 75 acres within said city, and has used and is using thereon water supplied from its said system as appurtenant to said land and for cultivating the same, and also holds said lands, with such appurtenant easement of water supply, for sale, and that said corporation retains the remainder of its said lands under said system—comprising about 4,000 acres, to which water has not actually been applied—at valuation not less than hereinbefore stated for raw land, with the incident and easement of water supply annexed, and has refused and at all times refuses to dispose of the same without including said water supply, except on the conditions that purchasers would pay to complainant the price for said lands so fixed by it, and to include the price of a water right or interest at six per cent. per annum on the price of such water right, at the option of the purchaser."

20. That part thereof commencing with the word "And," in line 21 of page 20 of said answer, as follows:

"And they say that in the classifications aforesaid made by said corporation and its receiver no discrimination is made or at any time has been made between lands of the first and second  
74 class in respect of the annual rate, and that the said additional

charge of six per cent. per annum upon the value of such water right applies only to such lands as shall receive the use and flow of water from said system for irrigation upon demand of their owners to share in that part of the said waters appropriated by said corporation to the public use in the cases where the owners

shall not have paid or secured to be paid, by contract or convention with said corporation, the gross sum demanded by it for the sale and conveyance of the water right for such lands, and they say that none of the lands of these defendants now under irrigation fall within the second class.

"And these defendants say that they have each accepted and concurred in and do accept and concur in the said classification of lands as made by said corporation and receiver, and that the same has become established, and that the same is just, equitable, and reasonable as between said corporation and all the land-owners under said system."

21. That part thereof commencing with the word "And," in line 9 of page 21 of said answer, as follows:

"And these defendants say that the aggregate number of acres of land now under irrigation from said system, including those of these defendants of said corporation and of all others, does not exceed 4,300 acres or one-half of the capacity of the reservoir and distributing capacity of the main pipe lines of said corporation after allowing for the domestic uses of 20,000 persons, and that about 800 acres of said land so irrigated lie in National City.

"And these defendants further say that neither of them know, and that neither of them has been informed, save by complainant's said bill and the statements of said corporation, what is the actual annual expense of operating and keeping in repair the said reservoir and water system of said company and furnishing its consumers with water, exclusive of the alleged interest of seven per

centum of \$300,000.00 of the bonds of said corporation referred to in said bill, but that upon such information they

are informed and believe, and therefore allege, that the said annual expenses do not exceed the sum of \$12,034.99, as stated in the bill of complaint herein.

"And they aver that the 'natural and necessary depreciation of its system' referred to in the bill of complaint is made good by the keeping of the same in repair, the cost of which is included in the annual charges, and they say that, as shown by the books of said corporation and its official reports, the aggregate, under the head of its accounting for 'water service,' 'maintenance of pipe lines,' 'maintenance of Sweetwater dam,' and 'expenses' for the years ending December 31st, 1890, 1891, 1892, 1893, and 1894, were respectively \$8,015.48, \$13,002.46, \$11,395.17, \$11,410.48, and \$7,850.18.

"And, answering upon such information, they allege that the amounts so actually realized from the whole system for water rentals alone, exclusive of any proceeds of the sale of water rights during said year, did not fall below \$25,715.00, and they say that at the same rates the amount that will be realized by said corporation from the annual rentals under said system, exclusive of any sums derived from the sale of water rights, will not, for the year ending January 1st, 1897, fall below \$27,000.00; and the defendants say and each of them says that the amount of \$25,715.00 was collected as water rentals for the year ending January 1st, 1896, for the several purposes for

which water was used from the said company's system, with the irrigation rate fixed at three and one-half dollars per acre per annum, and that the sum of twenty-seven thousand dollars is the measure of the yield for the year ending January 1st, 1897, from the said rentals, with the rate for irrigation fixed at the same annual rate of \$3.50 per acre, and with but two-thirds of the capacity of said system in use.

"And they further say that the said amounts actually realized annually from water rents under said system are derived  
76 from sums paid in respect of the lands owned by others than the said corporation and the rentals attributed to the lands owned by said corporation actually under irrigation, and that no part thereof has at any time been derived from or attributed to the lands of said corporation, whether still owned by it or heretofore sold by it, so long as the same were not or still are not actually irrigated."

22. That part thereof commencing with the word "And," in line 30, page 22, of said answer, as follows:

"And defendants further say that they are informed by the records and official reports of said corporation, and therefore aver the fact to be, that on January 31st, 1894, the net balance of its actual receipts from water rentals, based on collections actually made from lands actually irrigated, both those sold and those never owned by the company, and sums charged to lands owned by the company actually irrigated from February, 1888, to said December 31st, 1894, accumulated in its hands to the credit of said water system, after deducting the items of 'expenses,' 'maintenance of pipe line,' and 'maintenance of Sweetwater dam,' was \$49,699.28.

"But they say that said net balance to the credit of said water company's department on said December 31st, 1894, does not include any charge, rate, or assessment to the lands of said corporation which at any time were not or that now remain unirrigated."

23. That part thereof commencing with the word "But," in line 15, page 23, of said said answer, as follows:

"But these defendants, further answering, say that they deny that said corporation is entitled to demand or receive from these defendants any sums whatever by way of water rentals in behalf of or to apply upon the said demanded income of six per cent, or any net income on the alleged cost of said water system.

"And they deny that they or either of them own their said water rights in and under said water system, subject to any obligation, legal or equitable, other than such as arises from the actual rates established as aforesaid and collected by said company, which in case of their lands is \$3.50 per acre per annum.

"And they deny that the compensation to said corporation for either of their respective water rights, easements, or servitudes aforesaid were or are still subject to regulation by any board of supervisors of this State, as provided by said act of 1885."

24. That part thereof commencing with the word "They," in line 29, page 23, of said answer, as follows:

"They aver that such of their number as have purchased their

said lands, with water rights appurtenant thereto, from said corporation and such of their number as have purchased of said corporation water rights made appurtenant to their lands not bought of the corporation have each and all paid the full amount demanded by said corporation as the price of the perpetual easement of water supply from said company's water system by said company granted and annexed to such lands. They aver that such easements are respectively servitudes upon said company's water system and have been fully paid for, and that the owners of said lands are forever discharged and acquitted from payment of any further sum or sums to apply on the principal of or as income upon the cost or value of said water system or any debt incurred by said corporation for construction thereof or the value of their respective water rights.

"And they allege that said company, in each of said cases where water was devoted to the public use, received satisfaction for, from, and parted with to each of said defendants or to his or her predecessor in interest all right to demand and collect water rentals proportioned to said lands as corresponded or related to interest or income on the cost or value of said system or to net annual receipts and profits thereon or therefrom.

78 "And that in said respects it has at all times put all other lands to which it has voluntarily annexed said water rights upon the same footing, and that all such lands have remained on the same footing for more than five years; that said lands have in many cases changed owners while so supplied with water at the same rates and on the same footing as to water rights with the land sold by the said company with annexed water rights aforesaid; that the value of said water rights has for more than five years entered into the market value of said lands, and has in all cases been paid for to their vendors by the present owners, these defendants, who are successors in title by mesne or immediate conveyances of the lands to which during the former ownership the company voluntarily annexed said perpetual easement and water rights, and that neither any such lands nor the owners thereof are in any event liable for any other or further water rentals than are the lands the ownership of which, with said water rights, were derived from said corporation."

25. That part thereof commencing with the word "And," in line 13 of page 25 of said answer, as follows:

"And these defendants each say that said annual rate of \$3.50 per acre is the only actual rate which has ever been established, or that has ever been collected by said corporation, or which has at any time been paid or assented to by the consumers under said system from the said beginning of its water service down to the time of filing the bill of complaint herein.

"That said rate so actually established and collected has during more than nine years last past been uniform as to all the lands actually irrigated under said system, and defendants say that it has been uniform and without discrimination in respect of all the lands of these defendants at all times.

"And these defendants further say that they were induced to pur-

79 chase, improve, and settle upon their said respective parcels of land in reliance upon the fact that said rates of \$3.50 per acre per annum for irrigation under said system has during all said period of time been uniformly and actually established and collected by said corporation, and they aver that said irrigation rate has entered into the value of all the land of these defendants and is a material element of such value.

"They admit that no other person or corporation is or ever has been furnishing a supply of water to said defendants and other consumers, and that there is not now, nor has been, any other system of water works by which said defendants can be furnished with water."

26. That part thereof commencing with the word "And," in line 4, page 26, of said answer, as follows:

"And these defendants deny that the capacity of said water system is only sufficient to supply water to not exceed seven thousand acres, together with the domestic uses of a population of twenty thousand persons."

27. That part thereof commencing with the word "And," in line 10, page 26, of said answer, as follows:

"And they deny that at the rate of \$3.50 per acre, if water should be demanded and used upon the whole of the lands which the system is able to supply with water, and rates are allowed in said National City equally high for domestic uses and irrigation, said company would not be able to pay its operating expenses and maintain, from such rentals, its plant and system; they deny that said company has been, or still is, under said established rates, losing money every or any year; they deny that its said plant and system has been, or is, gradually going to decay from natural depreciation consequent upon its use in supplying consumers with water, without any or sufficient resources or means provided for said rates for replacing the same; they deny that said company, if said rate of \$3.50 per acre is maintained, will be compelled to furnish 80 water to consumers at any actual or continuous loss; and they deny that if the rentals derived from said system, at the rates actually established and collected, including said rate of \$3.50 per acre, are fairly applied to manage, operate, and maintain the same, that said system will be lost."

28. That part thereof commencing with the word "They," in line 18 of page 27 of said answer, as follows:

"They deny that \$7.00 per acre per annum, or any sum in excess of \$3.50 per acre per annum, is a reasonable rate for these defendants, as consumers, to pay; they aver that each of them is owner of a right and easement in freehold of the flow and use of water through the water system of said company, as in the bill of complaint alleged, and that the same is appurtenant to their respective lands, and that their lands fall within the first class established by said corporation; and that from them said company is not entitled to any interest on its investments in said plant; and they aver, that the sum of \$3.50 per acre per annum for the use and enjoyment of said easement and the maintaining and operating of

said system has been actually established as aforesaid, and is the only rate which has been collected by said corporation for the nine years last past from these defendants and their privies in the title to their said lands, and that no other rate has ever been actually established in respect of their lands, or at any time collected; and that said rate is the ample and sufficient contribution of said lands for the maintenance of said works."

29. That part thereof commencing with the word "And," in line 4 of page 28 of said answer, as follows:

"And these defendants aver that they and each of them, respectively, and their predecessors in estate, owners of the said several tracts of land now held and owned by the said defendants, have for more than five years prior to the first day of January, 1896,  
81 continuously held and enjoyed the use of the said waters upon their said lands for irrigation purposes, paying therefor the annual sum of \$3.50 per acre, and that such use and enjoyment has been open, notorious, continuous, adverse, and uninterrupted, and that they have thereby acquired the right to have and enjoy said water for the purpose of irrigating their said lands, paying therefor the said annual sum per acre, and that said right has become vested in them by such use under the said deeds of conveyance and representations and assurances, as aforesaid, and by the operation of section 318 of the Code of Civil Procedure of the State of California, and that they are entitled to have and use the said water from the said works, paying therefor the said sum per acre per annum, and no more."

30. That part thereof commencing with the word "And," in line 20, page 28, of said answer as follows:

"And these defendants aver that the said corporation is barred from having or maintaining any action at law or in equity to change the character of or add to the burden of said easement or to increase the said annual payment for the use of the said water, and is estopped to assert, claim, or exercise any right to change the said annual payment."

31. That part thereof commencing with the word "And," in line 15 of page 29 of said answer, as follows:

"And they say that said notice contained the further demand, as a condition to the refraining by said company from interfering with and shutting off the water supply of each of these defendants under their respective easements and water rights aforesaid, that the defendants each subscribe and execute an instrument upon a certain printed form designated 'Application for water,' which contained the following words and figures:

"NATIONAL CITY, CAL., — — —, 1896.

To the San Diego Land & Town Company:

82 The undersigned hereby applies for a permit to connect service pipes with the mains of the company and for water service under the rules and regulations of the San Diego Land & Town Company, which are expressly made the basis for the appli-

cation and which he agrees to observe for the following purposes and at the following rates for the year ending June 30, 1896.

No.	Monthly rate.	Annual rate.	Total.	Date.
-----	---------------	--------------	--------	-------

Family of four persons.

Additional persons.

Bath.

Water-closet.

Horses.

Horses.

Carriages.

Cows.

"

Lot and block property.

Lots.

"

"

Irrigated land.

Acres.

"

"

Interest charges.

Total annual rate for the year ending June 30, —, which I agree to pay, quarterly in advance, at the office of the San Diego Land and Town Co.

The water to be furnished under this application to be used on the following land or property:

Lot.	In block.	$\frac{1}{2}$ sec.
------	-----------	--------------------

National City.

National ranch.

Ex-Mission.

83 More fully described as follows:

The location of the *top* is on — side of — avenue,  
street,

between — and — avenues.

This contract shall remain in force until the first day of next July, when it may be terminated at the request of either party, notice to be served in writing; but in case no such request is made, then the same shall continue in force for one year, thereafter, and so on from year to year until such request is made; which request, when made, shall be to terminate this contract on the following July first.

Provided, that if the water is furnished under this application after June 30th, 1896, the same shall be paid for at the rate fixed by the proper authorities, or the rules of the company, for the year the same is furnished, and subject to the rules and regulations of the company, the same to be payable quarterly, unless otherwise provided by said rules and regulations.

Applicant: — — —

SAN DIEGO LAND & TOWN CO.,  
By — — —?"

32. That part thereof commencing with the word "And," in line 9 of page 33 of said answer, as follows:

"And they aver that said rate of \$3.50 per acre per annum established by said corporation, as set forth in the bill of complaint herein, is the only actual rate for irrigation which has ever been established and collected by said corporation or said receiver, and they aver that the same is the only rate which ever has been legally established or which is to be deemed or accepted as having been legally established by said corporation therefor.

"And these defendants deny that any increase of the rate for such rentals is at all necessary to enable said corporation or its receiver to maintain and operate said plant and pay the proper expenses of such maintenance and operation thereof."

84. 33. That part thereof commencing with the word "They," in line 28 of page 33 of said answer, as follows:

"They admit that their rights are the same to the extent that all are freehold easements, as aforesaid, and that the determination of the question of the right of said land & town company and of complainant to increase the rate of rental to be charged and collected will affect all of these defendants in the same way and to the same extent, except that the quantity of land owned by the several defendants is different."

34. That part thereof commencing with the word "But," in line 12 of page 34 of said answer, as follows:

"But the defendants each say, relating to the jurisdiction of this court of the said action against each defendant severally, that on and for a long time prior to January 1st, 1896, there was in force a rule adopted by the San Diego Land & Town Company, which was also adopted by said complainant as its receiver, as follows:

"1. All rates are payable at the company's office, and in all cases, except where the supply is taken through a meter or counter, will be collected in advance and within — (15) days of becoming due, as follows: For miscellaneous and domestic purposes, January, July, and October 1st, in quarterly payments.

"6. In case of non payment of the water rate within fifteen (15) days after becoming due the supply will be discontinued and will not be again renewed until full and satisfactory settlement of all arrearages shall be made, together with the sum of one dollar for turning on and off."

"That under said rule, on January 4th, 1896, being the time of the filing of the bill of complaint herein, the demand of complainant for increase of rentals 'to enforce the payment' of which complainant caused the water to be shut off from the premises of each of 85 these defendants until such demanded increase of rentals should be paid, as set forth and stated in the bill of complaint, was for the quarter year beginning with January 1st, 1896, and no longer; that no rental or compensation of any kind had accrued or become due or payable to complainant at the filing of the bill herein except for the said first quarter of said year.

"That such demanded increase of rental for any quarter of the year beginning January 1st, 1896, would, in case of no defendant or

defendants associated as partners, be as much as \$2,000.00, but in each case very much less than that sum, and in case of the defendant having the largest number of acres of land irrigated under said system would not equal \$58.00, and in case of no other as much as \$35.00, and of most others not to exceed \$3.75 each."

35. That part thereof commencing with the word "And," in line 13, page 35, of said answer as follows:

"And these defendants, further answering, say that they have no information, except as derived from the complainant's bill, from the solemn admission of said corporation, and from the records of the recorder's office of the county of San Diego, State of California, as to whether said corporation did borrow \$300,000.00 and as to whether it is compelled by pay thereon \$21,000.00 interest annually, or what portion of the said principal sum it applied to the acquisition and construction of its water system, and they deny that it is material for them to further answer any allegation with respect thereto."

36. That part thereof commencing with the word "And," in line 23 of page 35 of said answer, as follows:

"And these defendants, further answering, say that they each have at all times since January 1st, 1896, paid the rate or rental of \$3.50 per acre per annum to the complainant, as such receiver, and are willing and offer to pay the same as long as it continues to be legally established."

86 37. That part thereof commencing with the word "And," in line 28 of page 35 of said answer, as follows:

"And, further answering, these defendants say that the statute of the State of California of 1885 referred to in the bill of complaint and in this answer of these defendants, in so far as it purports to prohibit the said company from selling, disposing of, or alienating servitudes in freehold upon its said water system or its said property used or useful to the appropriation or furnishing of water, or to prohibit said company from contracting respecting the same, or from receiving full payment, satisfaction, or compensation therefor from any consumer willing to contract, purchase, and pay for the same, and in so far as said statute prescribes that such servitudes shall be enjoyed by the owner of the land to which the same are annexed as easements only upon the terms and conditions that such owners render net annual receipts and profits upon the value thereof in perpetuity, and in so far as said statute purports to prohibit said company and the consumers of water under it from the making of contracts by said between said company and water consumers respecting the annual receipts, profits, and income of any of said property, or to extinguish and satisfy and make acquittance of any right of said company to such net annual receipts, profits, and income, and in so far as such statute prohibits any of the contracts in this answer set forth relating to the sale, transfer, or vesting of the flow and use of water in freehold annexed to the land of the respective defendants herein, and in so far as it prohibits the sale, transfer, and vesting of the ownership of the water rights in the bill of complaint referred to in these defendants respectively and

from becoming annexed to their respective parcels of land, the same is unconstitutional and void as being in conflict with the XIV amendment of the Constitution of the United States, in that such statute would deprive said company and these defendants of their liberty without due process of law and would deny them and each of them the equal protection of the laws, and as being in conflict with the declaration of rights contained in section one of the constitution of the State of California, and which said section is in words and figures following to wit:

*"Article 1, Declaration of Rights—Inalienable Rights.*

"SECTION 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life, liberty and property, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."

"And as being in conflict with article twenty, section nine, of the constitution of the State of California, which is as follows:

"SECTION 9. No perpetuities shall be allowed, except for eleemosynary purposes."

38. That part thereof commencing with the word "And," in line 7 of page 37 of said answer, as follows:

"And each defendant for himself says that his liability to pay rentals or charges of any kind for the service of said system is several and not joint, except only in the case of said defendants associated as partners, which is joint only as between such partners.

"And the defendants say that the following defendants, among others, are not inhabitants or residents of the State of California and are not competent to make petition to the board of supervisors, as provided in section 3 of said act of 1885, to wit:

"T. M. Eaton, Charles Mohnike, the heirs of Schulenburg, deceased; E. J. Elliott, H. E. Klamer, D. S. McBean, Edwin S. Belcher, J. W. Stearns, N. J. Pillsbury, Mary D. Klamer, Arthur Ryan and Michael Mack, L. V. Wright.

88 "And they say that the following-named defendants are public-school corporations and not tax-payers of any county of this State:

Chula Vista School District, Sunnyside School District, Sweetwater School District, and for said reasons are not competent to make such petition.

"And the following-named defendants, among others, are not inhabitants of said county of San Diego, to wit: Edward Gulick, William Gulick, and J. O. Rhinehart, and for said reasons are not competent to make such petition.

"And said defendants, so being incompetent to petition the board of supervisors, as provided by section 3 of said act of 1885, say and all the defendants say that they have no power to compel any sufficient number of competent inhabitants who are tax-payers to join in a petition to the board of supervisors, as provided in said section 3 of said act."

39. That part thereof commencing with the word "And," in line 3 of page 38 of said answer, as follows:

"And these defendants say that said statute of the State of California approved March 3rd, 1885, in so far as it assumes or purports to authorize or empower said San Diego Land & Town Company or said receiver to increase, as is alleged in the bill of complaint, said rate of \$3.50 per acre per annum heretofore actually established and collected from the defendants without the consent of the defendants and each of them, is in violation of section one of article XIV of the amendments of the Constitution of the United States, and deprives each of them of his and her property without due process of law and denies to each of them the equal protection of the law."

40. That part thereof commencing with the word "And," in line 14 of page 38 of said answer, as follows:

"And these defendants further say that, in so far as said statute of 1885 purports to authorize or empower said land & town company or its receiver to shut off or to justify them or either of them in their act, as set forth in the bill of complaint, in shutting off the water from the lands of these defendants or either of them, or to deprive these defendants or either of them of the enjoyment of their said water rights and of their said easements of the flow and use of such water for the irrigation of their said respective tracts of land as a means of enforcing against these defendants the collection of the increase of rental demanded in the bill of complaint or any increase made without consent of these defendants of the said rate of \$3.50 per acre per annum heretofore actually established and collected from these defendants, and in so far as said statute purports to permit or authorize such enforced collection without permitting these defendants to have any standing in this court to contest the reasonableness of said increase of rates, and in so far as it purports to empower this court or any court to enjoin these defendants or any of them from contesting the reasonableness of said increase of rates in any court, the same is unconstitutional and void as tending to deprive and depriving these defendants and each of them of their property without due process of law, and as tending to deprive and depriving them and each of them of the equal protection of the laws is in violation of section one of the XIV amendment of the Constitution of the United States."

41. That part thereof commencing with the word "And," in line 7 of page 40 of said answer, as follows:

"And these defendants humbly submit and insist that the rate of rental for irrigation of each of their said parcels of land ought not to be changed or altered from the rate of \$3.50 per acre per annum, being the rate and rental actually established and collected by said San Diego Land & Town Company and said receiver, as aforesaid."

42. That part thereof commencing with the word "And," in line 19 of page 40 of said answer, as follows:

90        "And these defendants aver and each of them avers that the acts of said receiver, as set forth in the bill of complaint,

in undertaking to raise the said rate of \$3.50 per acre per annum for irrigation to \$7.00, and in shutting off the water supply, as in the bill of complaint alleged, are and each of them is in violation of article V of the amendments of the Constitution of the United States, ~~was~~ acts done under a color of authority of the United States, tending to deprive and depriving these defendants and each of them of their property without due process of law."

43. That part thereof commencing with the word "And," in line 28 of page 40 of said answer, as follows:

"And these defendants, as matter of supplement to their said answer, state that the legislature of the State of California, at the session thereof held in 1897, passed an act entitled 'An act to amend an act entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in this State other than in city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use," approved March 12th, 1885, by inserting a new section therein relating to contracts for the sale, rental, and distribution of water, and the sale or rental of easements and servitudes of the right to the flow and use of water,' and which said act was duly approved by the governor of the State of California on the 13th day of March, 1897, and thereupon immediately went into effect.

"And defendants further aver that the addition so by the said amendment made to the said act was a section numbered 11 $\frac{1}{2}$ , and which said section is in the words following, to wit:

"SECTION 11 $\frac{1}{2}$ . Nothing in this act contained shall be construed as prohibiting or invalidating any contract already made, or which shall be hereafter made, by or with any of the persons, companies, associations or corporations described in section two of this act, relating to the sale, rental or distribution of water or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract."

44. That part thereof commencing with the word "And," in line 20 of page 41 of said answer, as follows:

"And these defendants further aver upon information and belief that by virtue of the said provisions of the Constitution of the United States and of the State of California and under and by virtue of the act of the legislature of March 13, 1897, before mentioned, these defendants and each of them had the right to enter into the contracts with the said San Diego Land & Town Company herein set forth, and the said contracts are valid and effectual, and that the said complainant had no right to make such increased charge for the use of water as aforesaid."

Second. That the defendants by their said answer aver and claim that they have by purchasing lands from the said San Diego Land and Town Company and by the purchase of water rights from said company returned to it a part of its principal invested in its said water works, and that therefore they should not be required to pay rates upon a basis of allowing to said company any interest on the amount of principal so advanced or returned to it, but said answer

is evasive and uncertain, for that it does not show which, if any, of said defendants have so paid or advanced any of the said principal or how much thereof, if any, has been paid or returned to said company by all of said defendants.

Third. That it is admitted by said answer that the actual and just cost of the water works and system of said San Diego Land and Town Company is \$750,000.00, and the law of the State of California allows said company as a reasonable return on said investment the sum of not less than six nor more than ten per cent. not on the said value of said plant and system, and it affirmatively appears from said answer that the annual rental of \$7.00 per acre per annum will not and cannot realize to said company said sum of six per cent. net per annum allowed it by law.

Fourth. That with respect to all of the matters and things in said answer set forth, other than the allegations hereinabove set forth as irrelevant and impertinent, the denials and averments contained in said answer are evasive, imperfect and insufficient, and fail, either separately or as a whole, to show that the matters and things set forth in the bill of complaint herein are not true.

Fifth. That it appears affirmatively from the answer of the defendants that the complainant has legally established and is entitled to collect a water rental of \$7.00 per acre per annum for the irrigation of the lands of the defendants and each of them respectively, and that it is entitled to collect said amount as alleged in the bill of complaint herein unless said rate is unreasonable; and it is further shown and appears from said answer that the defendants have no standing in this court to contest the reasonableness of said rates, but that their remedy, if any they have, is to apply to the board of supervisors of the county in which their said land is situated to fix and establish said rates.

Sixth. That the said answer shows on its face that the complainant is legally and equitably entitled to charge and collect the rate of \$7.00 per acre for the irrigation of the lands of the defendants, and that said rate is reasonable and just.

In all which particulars the complainant is advised that the answer of the defendants is altogether evasive, imperfect, insufficient, and impertinent.

Wherefore said complainant doth except thereto and prays that the defendants may be compelled to amend the same and put 93 in a full and sufficient answer to the complainant's bill.

WORKS & WORKS,  
*Solicitors for Complainant.*

That on the 16th day of November, 1897, the complainant, Charles D. Lanning, receiver, served and filed the following notice of motion:

“(Title of Court and Cause)

“The defendants are hereby notified that on Monday, the 22nd day of November, 1897, the complainant, Charles D. Lanning, receiver of the San Diego Land & Town Company, will move the court

for the discharge of the said Charles D. Lanning as such receiver and will, at the same time and place, move the court that the San Diego Land & Town Company of Maine be substituted as complainant in said suit in lieu of the complainant above named.

Said motion will be made at the court-room of said court, in the post-office building, in the city of Los Angeles, State of California, and will be made on the ground that all of the property mentioned and described in the bill of complaint filed herein has, under and by virtue of a decree of this court, been sold by said receiver to the said San Diego Land & Town Company of Maine and the proceeds of such sale received by said receiver, and that said receivership has been fully settled and closed, and that the said San Diego Land & Town Company of Maine has acquired all of the right, title, and interest of the said San Diego Land & Town Company in and to all of said property and is now the only party interested in the further litigation of the questions involved in this suit.

Said motion will be based upon the pleadings, miutes, and proceedings of the court in said cause.

WORKS & WORKS,  
*Solicitors for Complainant.*"

94 That on the 22nd day of November, 1897, said court made and entered the following order, to wit:

"CHARLES D. LANNING, Receiver, Complainant, }  
vs.  
H. C. OSBORNE ET AL., Defendants. } No. 671.

"This cause coming on for hearing at this time on a motion of complainant for substitution of plaintiff, J. D. Works, Esq., of counsel, appearing as solicitor for complainant; John S. Chapman, Esq., of counsel, appearing as solicitor for defendants, is called, and said motion having been argued by respective counsel, it is ordered that the same be submitted to the court for its consideration and decision. It is further ordered that the exceptions to the answer hereinbefore submitted in this case be now sustained; to which ruling of the court defendants, by John S. Chapman, Esq., their counsel, except."

That on the 6th day of December, 1897, the court made and entered in said cause the following order:

"CHARLES D. LANNING, Receiver of the San Diego Land  
& Town Company, a Corporation, Complainant, }  
vs.  
H. C. OSBORN ET AL., Defendants. } No. 671.

"This cause having heretofore been submitted to the court for its consideration and decision upon the motion of the complainant, Charles D. Lanning, receiver of the San Diego Land and Town Company, for the discharge of the said Charles D. Lanning, as such receiver, and that the San Diego Land & Town Company of  
95 Maine be substituted as complainant in said suit in lieu of the complainant above named, and the court having duly

considered the same and being fully advised in the premises, it is now, on the 6th day of December, 1897, ordered that said motion be, and the same hereby is, granted, and the San Diego Land & Town Company of Maine be, and hereby is, substituted as complainant in said suit in lieu of the complainant above named; to which ruling of the court defendants, by their counsel, J. S. Chapman, ask and are allowed an exception."

That on the 6th day of December, 1897, the San Diego Land & Town Company of Maine served upon defendants and filed the following notice of motion:

"THE SAN DIEGO LAND & TOWN COMPANY OF MAINE, Com- }  
plainant,  
vs.  
H. C. OSBORN ET AL., Defendants. }

"The defendants in the above-entitled suit are hereby notified that on Monday, the 20th day of December, 1897, at 10:30 o'clock a. m., or as soon thereafter as counsel can be heard, the complainant will, at the court-room of said court, in the Federal building, in the city of Los Angeles, State of California, move the court for an order that the bill in said suit be taken *pro confesso*, and that decree of the court be entered accordingly.

Said motion will be made on the minutes and proceedings of the court and the papers on file in said suit, and will be made upon the ground that exceptions have been sustained to the answer of the defendants, and that they have failed to file an amended answer within the time prescribed by law and the rules of the court.

WORKS & WORKS,  
*Solicitors for Complainant.*"

96 That on Monday, the 20th day of December, 1897, said circuit court made and entered its order as follows:

"That SAN DIEGO LAND & TOWN COMPANY OF MAINE, }  
Complainant,  
vs.  
H. C. OSBORN ET AL., Defendants. } No. 671.

"This cause coming on this day to be heard, on the motion of complainant for an order that the bill in said suit be taken *pro confesso*, and that a decree of the court be entered accordingly—J. D. Works, Esq., appears as counsel for complainant and A. Haines, Esq., appears as counsel for defendants—now, on motion of defendants' counsel and with the consent of complainant's counsel, it is ordered that the cause be, and the same hereby is, continued two (2) weeks for said hearing."

That on the 27th day of December, 1897, the defendants served upon the counsel for Charles D. Lanning, receiver, complainant, the following notice of motion, to wit:

"(Title of Court)

"CHARLES D. LANNING, Receiver, Complainant, }  
vs.  
H. C. OSBORN ET AL., Defendants. }

"To Messrs. Works & Lee, attorneys for complainant:

Take notice that the defendants will on Monday, the 3rd day of January, 1898, move the court at the opening of the court on that day, or as soon thereafter as counsel can be heard for that purpose, to dismiss the suit upon the following grounds, to wit:

First. That the receiver has been discharged and has no  
97 further interest in the matter.

Second. That the property has been sold under foreclosure and passed into the hands of another corporation, and the receiver no longer has any charge over it.

Third. That the San Diego Land & Town Company of Maine is not the successor of Lanning, the receiver, and has no interest in the matters alleged in the bill nor any right to prosecute the said action.

Fourth. That neither the original corporation nor the receiver nor any creditor of the said corporation has any interest in the subject-matter of this action, and that since the commencement of said action the board of supervisors of the county of San Diego have passed an order or resolution fixing the rates to be charged by the San Diego Land & Town Company of Maine for furnishing water to the defendants and to all others.

That said motion will be made upon the records and files in the case and the minutes of the court and upon the affidavit of J. S. Chapman; a copy of which is hereto annexed.

C. H. RIPPEY,  
HAINES & WARD, &  
J. S. CHAPMAN,

*Attorneys for said Defendants.*

Dated December 27th, 1897."

"(Title of Court and Cause.)

"STATE OF CALIFORNIA, }  
*County of Los Angeles,* } ss.

J. S. Chapman, being duly sworn, deposes and says that he is one of the attorneys for the defendants in the above-entitled action, and that he is informed and believes and therefore states that since the commencement of this action the board of supervisors of the county of San Diego, State of California, have duly passed an ordinance  
98 fixing the rates to be charged for the use of water by the San Diego Land & Town Company of Maine, the successor of the San Diego Land & Town Company of Kansas, as will more fully appear by the certified copy of the ordinance hereto attached and made a part of this affidavit.

And further deponent saith not.

J. S. CHAPMAN.

Subscribed and sworn to before me this 27th day of December, 1897.

[SEAL.]                    ALFRED C. DEZENDORF,  
*Notary Public in and for the County of  
 Los Angeles, State of California.*

(Certified copy of ordinance annexed.)

That on the 3rd day of January, 1898, the court made and entered its order in words and figures following, to wit:

"THE SAN DIEGO LAND & TOWN COMPANY OF MAINE, }  
 Complainant,    } No. 671.  
 vs.  
 H. C. OSBORN ET AL., Defendants.    }

"This cause coming on this day to be heard on the motion of the defendants that the court dismiss the suit, and also to be heard upon the motion of complainant for an order that the bill in said suit be taken *pro confesso*, and that a decree of the court be entered accordingly, John D. Works, Esq., appearing as counsel for complainant, and J. S. Chapman, Esq., and A. Haines, Esq., appearing as counsel for defendants, and said motions having been presented to the court by counsel, it is now ordered that said motion to dismiss be, and the same hereby is, denied; and the defendants not having answered the bill, it is further ordered that said bill be, and the same hereby is, taken *pro confesso* as against all of said defendants, and that a decree of this court be entered in accordance with the opinions 99 of the court on file in this suit; to which ruling of the court defendants, by their counsel, note and allowed an exception."

That afterwards, on the 12th day of February, 1898, without proofs, the court made and caused to be entered in said cause, greatly to the prejudice and injury of your orators, its final decree; which said decree is entered at large upon the records of this court and is in words and figures as follows, to wit:

"In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

2 SAN DIEGO LAND & TOWN COMPANY OF MAINE, Substituted as Complainant in the Place of Charles D. Lanning, Receiver of the San Diego Land & Town Company, Complainant,

vs.

H. C. OSBORNE, WILLIAM KNAPP, A. BARBER, MRS. E. L. WILLIAMS, T. M. Eaton, J. M. Davidson, A. J. Smith, A. Hammond, John T. Judkins, Henry Gulick, Sr.; H. S. Whittaker, A. Barnett, J. N. Woodward, A. B. Stephens, John Nickson, J. H. Fawcett, Payne Brown, W. E. Montgomery, Monroe Johnson, A. Haines, M. L. Ward, Ella B. Ward, A. Keene, Fred Keene, E. K. Earle, H. F. Earle, Thomas Walker, A. G. White, W. J. Brower, P. B. Smith, F. B. Merriam, H. Hyatt, H. Stegeman, R. S. Harris, A. A. Gooden, G. A. Dukes, C. H. Rippey, Virginia Rippey, C. C. Jobes, J. L. Griffin, Tallie Spenceen Sullivan, W. C. Kimball, J. C. Frisbie, S.

W. Morgan, George Hannah, Charles O. Brown, F. B. Webb, John Haberfellner, W. S. Wilkins, S. W. Hines, Chula Vista School District, S. Healey, M. E. Phinney, D. L. Murdock, Dan. P. Stetzelberger, R. P. Middlebrook, Anson Titus, W. A. Henry, J. W. Preston, W. E. Ballinger, J. H. Blakeslee, J. Morley, C. F. Wiggins, S. F. Dickinson, O. C. Noyes, J. E. Clouse, Peter Morse, E. W. Dyer, Parsons Shaw, A. C. Crockett, E. E. Flanders, Elisha M. Gavin, Stephen Sheffield, C. A. Whittemore, F. Gardner, Charles Mohnike, Carl Reinisch, David K. Horton, George Henninger, J. M. Cook, O. H. P. Forker, I. N. Lamson, George D. Hayes, A. A. Groat, J. H. Bowen, R. H. Longshare, W. O. Bowen, J. G. Shaw, Julian Field, C. E. Foss, Otto Sollner, A. B. Story, L. E. Allen, C. F. Chadwick, A. R. Schulenburg, James W. Jackson, John H. Ferry, Frank W. Hedges, A. V. Bills, C. L. Barber, A. J. Stokes, T. E. Walker, A. J. Grainger, E. P. Hammack, Wah Hong, Edward Gulick and William Gulick and Henry Gulick, Partners, Doing Business under the Firm Name of Gulick Brothers; John J. Jones, Wm. D. Webber, W. F. Stearns, H. H. Rice, W. J. Henderson, P. W. Morse, O. Darling, Walter Price, S. J. Bradt, R. W. Vaughan, F. A. Moses, E. J. Elliott, M. E. Jennings Verity, J. E. Stephens, R. G. Wallace, George H. Hancock, Frank Howe, I. N. Morse, Emil O. Hoeh, C. S. Johnson, C. W. Ellsworth, Wm. Steckle, J. H. Clough, George L. Henderson, M. Cox, John Johnson, A. T. Burr, A. M. Jameson, H. E. Klamer, J. H. Dean, P. S. Leisenring, J. M. Johnson, Ah Quinn, Ah Lit, J. M. Ballou, S. H. Dale, George M. Tutton, E. P. Lounsbury, George W. De Tar, D. D. Foss, Austin Carey, George J. Jecock, D. S. McBean, Quiney A. Petts, Morton Penfield, J. A. Thomas, J. O. Reinhart, William Doyle, F. O. Reinhart, H. I. Atwater, E. H. Woods, N. H. Downs, Edwin S. Belcher, W. G. Terrell, T. G. Ellis, W. M. Carr, D. F. Garrettson and Elisabeth A. Garrettson, Executors of the Estate of G. A. Garrettson, Deceased; George M. Darnell, Flora B. Arndt, J. W. Stearns, P. W. Beck, M. G. Miller, J. F. Morrill, Fred W. Pearson, Sunnyside School District, N. J. Pillsbury, Julia Latta, Mary R. Klamer, Thomas Lindsay, E. P. Carr, I. M. Howe and H. B. Howe, Partners, Doing Business under the Firm Name of Howe Brothers; Arthur Ryan and Michael Mack, Partners, Doing Business under the Firm Name of Ryan and Mack; F. E. Leslie and H. P. Whitney, Partners, Doing Business under the Firm Name of Leslie & Whitney; James H. Forbes, J. A. Pinkerton, S. D. Murdock, W. Weitekamp, John L. Davis, George H. Eaton, George Rippe, J. H. Greife, F. W. Reid, R. S. Harris, Sweetwater School District, L. W. Goff, George Dashbaugh, William Campbell, Henry Walker, C. C. Hughes, Frank A. Kimball, Henry Haberfellner, F. Mederle, L. C. Wright, Cyrus Johnson, A. W. Howard, Laura F. Meyer, George E. McMurry, F. H. Downs, N. W. Downs, I. P. Dana, Defendants.

It appearing to the court that on the 5th day of May, 1896, this suit was dismissed as to the defendants I. P. Dana, F. E. Lester,

H. P. Whitney, partners, doing business under the firm name of Lester & Whitney; H. Copeland, George O. Shattuck, J. S. Nickerson, F. A. Moses, John F. Hogan, Charles O. Brown, Fannie Grant, W. D. Bowen, C. W. Ellsworth, William Campbell, Walter Price, J. H. Bowen, William Steckel, H. H. Rice, and Sweetwater Fruit Company, and the exceptions of the complainant to the last amended and further answer of the other defendants, filed herein September 13, 1897, having been by the court sustained, and the said defendants having failed to amend their said answer or to plead further, and the complainant, San Diego Land & Town Company of Maine, having been ordered by this court, made and entered on the 6th day of December, 1897, substituted as complainant in place of the original complainant, Charles D. Lanning, receiver of the San Diego Land & Town Company of Kansas, and an order having been duly entered by this court on the 3rd day of January, 1898, that complainant's bill of complaint herein be taken *pro confesso*, for want of an answer, against all of the defendants except those as to whom the action was dismissed as aforesaid, and thirty days having expired since said last-mentioned order was made:

Now, therefore, as to those defendants against whom this action was dismissed as aforesaid the court finds that said defendants are entitled to a decree of dismissal and for their costs.

The court further finds as against all of the other defendants that the allegations contained in the bill of complaint herein are true, and that the complainant, San Diego Land & Town Company of Maine, is entitled to a final decree against said defendants, in conformity to the opinion of the court filed herein September 14, 1896, and for the costs and expenses laid out and expended herein by said complainant and by the original complainant, Charles D. Lanning, receiver of the San Diego Land & Town Company of Kansas.

It is therefore considered and decreed by the court that this suit be, and the same is, dismissed as to the defendants as to whom the same was dismissed by the complainant as aforesaid, and that they recover of the complainant their costs.

It is further considered and decreed by the court that the defendants herein other than those defendants as to whom this suit has been dismissed as aforesaid be, and they are hereby, perpetually enjoined from prosecuting in the State courts or elsewhere separate actions against the complainant, San Diego Land & Town Company of Maine, to prevent said complainant from collecting or enforcing the collection of the rate of \$7.00 per acre per annum for the irrigation of the lands of said defendants and each of them, fixed and established by the San Diego Land & Town Company and by Charles D. Lanning, receiver, as in the said bill set forth, until the fixing and establishing of such rates by the board of supervisors of the county of San Diego, State of California, or the re-establishment thereof in accordance with law.

It is further considered and decreed by the court that the said San Diego Land & Town Company and Charles D. Lanning, receiver, had the right to increase the amount of the water rentals of said

103 company for water furnished to the lands of said defendants from \$3.50 per acre per annum to the sum of \$7.00 per acre per annum for such irrigation, and that the said defendants be, and they are and each of them is hereby, required to pay to the complainant said rate of \$7.00 per acre per annum for water furnished their lands, as set forth in the bill of complaint herein, from and after the first day of January, 1896, until the fixing and establishing of such rates by the board of supervisors of San Diego county, California, or the re-establishment thereof in accordance with law, as a condition upon which water shall be furnished them by the complainant, and that upon failure of said defendants or any of them to pay said rates the complainant, San Diego Land & Town Company of Maine, be, and it is hereby, authorized to shut off the supply of water to such or any of said defendants who shall fail for five days to make such payment: Provided that the furnishing of water to the defendants for other purposes be not thereby interfered with.

It is further considered and decreed by the court that the complainant recover of said defendants the costs and expenses laid out and expended in this suit by the complainant, San Diego Land & Town Company of Maine, and by the original complainant, Charles D. Lanning, receiver of the San Diego Land & Town Company."

That your orators have paid the costs adjudged against them by said decree in the sum of \$107.15, and have in all things obeyed and performed said decree.

104 And for errors apparent in the orders and decree aforesaid your orators and each of them, among other things, show:

*Errors in Sustaining Exceptions to Answer Numbered First, Second, Third, Fourth, Fifth, Sixth.*

First. That the order made in said cause under date November 22, 1897, sustaining the exceptions and any of the exceptions on part of complainant filed herein on Sept. 22, 1897, to the further answer and the supplemental answer of your orators, defendants in said cause, filed Sept. 13, 1897 (after the expunging of the entire former answers of defendants by the orders of the court sustaining complainant's exceptions thereto for irrelevancy and impertinence), is erroneous in the following respects, to wit:

Said order erroneously treated and considered said exceptions filed September 22, 1897, as raising for decision the merits of the defenses set forth in said answer, and said order expunged said answer from the record and deprived all said defendants, including your orators, of their right to have said answer considered upon the final hearing of said cause, whereas the merits of said defenses were open to decision on the face thereof only upon the setting down of the cause for hearing upon bill and answer, and that your orators were by said order deprived of their rights to have the merits of said defenses on their face regularly determined upon the setting of the cause for hearing on bill and answer, or upon issues raised and proofs made.

*Errors in Sustaining Exception Numbered First to the Further Answer  
and Supplemental Answer.*

Second. That said order of November 22, 1897, in sustaining of the exceptions filed herein Sept. 22, 1897, to the answer of your orators, filed Sept. 13, 1897, that numbered "first," for alleged immateriality, irrelevancy, and impertinency, is error apparent, 105 in that the expunging thereby of the parts of the answer in said first exception set forth prevented all the defendants from showing upon the record of said cause and from establishing by proofs or otherwise and from having any benefit of the matters and defenses set forth in all such parts of their answer, although neither of the matters excepted to nor any part or parts thereof are immaterial, irrelevant, or impertinent.

And that said order is error apparent in sustaining each subdivision of said first exception and in expunging the portion of the answer in each such subdivision set forth, to wit, subdivision 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44.

That it was error apparent among other errors to consider and adjudge by said order upon said first exception the matters following, to wit:

That all of the allegations of said answer setting forth that the waters and water system of the San Diego Land & Town Company of Kansas were its private property were immaterial, irrelevant, and impertinent.

And that all the allegations of said answer setting forth that said corporation, by the contracts, agreements, conveyances, transfers, acts, representations, classifications, and admissions made by it and made under the circumstances, all as in the answer set forth, did grant to and vest in your orators and did recognize and acknowledge their water rights and freehold easements of the flow and use of water from said water system as appurtenant to lands owned respectively by your orators and as constituting corresponding freehold servitudes on said company's water system were immaterial, irrelevant, and impertinent, and that they were so in virtue of the constitution and laws of the State of California.

And that all the allegations of said answer setting forth 106 that all claims and demands of said company for the price or compensation for said water rights, easements, and servitudes had been paid or otherwise satisfied were immaterial, irrelevant, and impertinent, and that all such freehold water rights, easements, and servitudes were void and in conflict with the constitution and laws of said State.

And that all the allegations of said answer setting forth the representations, agreements, and contracts, made by said corporation of Kansas to and with each of your orators, fixing the water rate for irrigation of their lands under their respective water rights, easements, and servitudes at the rate of \$3.50 per acre per annum

were irrelevant, immaterial, and impertinent, and that any such contracts or agreements are in conflict with the constitution and laws of the State of California and void, and that all such allegations of the contractual fixing of water rates in connection with all such allegations of water rights, easements, and servitudes were altogether impertinent in defense to the demand of said corporation and its said receiver to increase without the consent of your orators the rate of \$3.50 per acre per annum for irrigation of their lands to \$7 per acre per annum.

And that all the allegations of said answer setting forth that the rate of \$3.50 per acre per annum for irrigation of the lands of your orators was the only rate which had ever been actually established and collected by said corporation were immaterial, irrelevant, and impertinent.

And that the allegations that your orators were induced to purchase, improve, and settle upon their respective tracts of land in reliance upon said established rate of \$3.50 per acre were immaterial, irrelevant, and impertinent.

And that the allegations that your orators had for more than five years held and enjoyed the use of said water upon their land 107 for irrigation purposes at said annual rate of \$3.50 per acre, and that the right to have and enjoy the use of said water at said rate became vested in your orators respectively by operation of the statute of limitations of the State of California, were immaterial, irrelevant, and impertinent.

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And that the allegations that your orators were induced to purchase, improve, and settle upon their respective tracts of land in reliance upon said established rate of \$3.50 per acre were immaterial, irrelevant, and impertinent.

And that the allegations that your orators had for more than five years held and enjoyed the use of said water upon their land for irrigation purposes at said annual rate of \$3.50 per acre, and that the right to have and enjoy the use of said water at said rate became vested in your orators respectively by operation of the statute of limitations of the State of California, were immaterial, irrelevant, and impertinent.

Amended by  
order of court  
December 5th,  
1898. Wm. M.  
Van Dyke, clerk.

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And that all the allegations of said answer setting forth the total irrigation capacity of said water system and the proportion of the same not used and all the other facts and circumstances pertaining to the reasonableness of said increase of rate set forth in said answer were irrelevant, immaterial, and impertinent to be answered to such demanded increase.

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[Matter enclosed between rules erased in copy.]

And that the denial that said corporation was entitled to demand from your orators water rentals beyond \$3.50 per acre per annum to apply upon the demanded net income of six per cent. per annum was immaterial, irrelevant, and impertinent.

And that the denial that the compensation to said corporation for either of your orators' respective water rights, easements, and servitudes was or still is subject to regulation by any board of supervisors of said State, as provided in said act of 1885, was irrelevant, immaterial, and impertinent.

And that the denial that at the said rate of \$3.50 per acre for irrigation, together with rates for domestic use, if water should be demanded and used upon the whole of the land which the 108 said system is able to supply with water, said company would not be able to pay its operating expenses and maintain from such rentals its plant and system, and the denial that by reason of said established rate said company was losing money, and the denial that the plant of said company is going to decay, without sufficient resources from said rate for replacing the same, and the denial that said company at said rate of \$3.50 will be compelled to furnish water to consumers at any loss, or that, if said rate of \$3.50 is maintained, said system will be lost, are immaterial, irrelevant, and impertinent.

And that the allegation of the requirement, as a condition to the restraining by said company and its receiver from shutting off the supply of water to each of your orators under their respective water rights and easements, that your orators should subscribe and execute the agreement, designated "Application for water," set forth in the complaint was immaterial, irrelevant, and impertinent.

And that the denial that any increase of the said rate of \$3.50 is at all necessary to enable said corporation or its receiver to maintain and operate said water plant and pay the expenses of the maintenance and operation thereof is irrelevant, immaterial, and impertinent.

That the allegations relating to the amount in controversy as to each of your orators and as affecting the jurisdiction are irrelevant, immaterial, and impertinent.

And that the allegations of the answer which rely upon and invoke the application of the provisions of section one of article XIV and of article V of the amendments to the Constitution of the United States, and which rely upon and invoke the application of section one of article I and of section nine of article XX of the constitution of California, and which rely upon and invoke section 11 $\frac{1}{2}$  of the amendment of the act of March 12, 1885, of the 109 State of California, set forth in said answer, and each of them, are immaterial, irrelevant, and impertinent.

#### *Error in Sustaining the Second Exception.*

Third. That there is error apparent in the said order of November 22, 1897, in that it sustains the second of the exceptions filed herein September 22, 1897, to the answer filed Sept. 13, 1897, in as-

much as the bill of complaint alleges that each of your orators, defendants to said bill, are owners of their water rights and alleges no distinction or discrimination between such rights, whether acquired by purchase or otherwise, and calls for no answer as to which became such owners by purchase and which became owners otherwise, and that the answer is not evasive or uncertain, as alleged, but shows that such water rights, easements, and servitudes, however acquired, are each in freehold, and that each has been created by said corporation of Kansas, and that compensation for each has been paid, or that satisfaction has been otherwise made to said corporation for the same.

*Error in Sustaining Third Exception.*

Fourth. That there is error apparent in the order of November 22, 1897, in so far as it sustains the third of the exceptions filed herein September 22, 1897, to the answer filed Sept. 13, 1897, in that said exception assumes, against the fact, that said answer admits that the just cost of said water system to said corporation of Kansas was \$750,000, and in that said exception assumes, against the fact, that it affirmatively appears by the said answer that the annual rental of \$7 per acre per annum will not and cannot realize to said company the sum of 6 per cent. net income per annum, and in that said exception assumes and said order sustains the assumption that the law of the State of California allows said company, as against your orators, the defendants to said bill, as a reasonable return on their investment the sum of not less than 6 nor more than 110 18 per cent. net on the value of said plant and system without regard to the water rights, easements, and servitudes owned by your orators, as set forth in their said answer, and without regard to the agreements of said company with your orators as to the annual rate of \$3.50 per acre per annum, as set forth in said answer.

*Error in Sustaining Fourth Exception.*

Fifth. That there is error apparent in said order of November 22, 1897, in so far as it sustains the exception numbered fourth of those filed September 22, 1897, to the answer filed Sept. 13, 1897, in that said exception points out no matter in the bill of complaint which is not well and sufficiently answered or respecting which the denials or averments of the answer are evasive, imperfect, or insufficient; wherefore said exception is insufficient in form to point out to or inform the defendants to said bill of any insufficiency in said answer, and on that ground ought not to have been sustained.

And that there is error apparent in said order, in that none of the denials, admissions, or averments in said answer are evasive or imperfect or insufficient.

*Error in Sustaining the Fifth Exception.*

Sixth. That there is error apparent in the order of November 22, 1897, sustaining the exception numbered fifth of those filed September 22, 1897, to the answer filed September 13, 1897, in that said order assumes and decides that the question whether it appears from the answer of the defendants that the complainant receiver has legally established and is entitled to collect a water rental of \$7.00 per acre per annum for the irrigation of the lands of the defendants and each of them respectively is properly triable upon exception to the answer.

And that there is error apparent in said order, in that said exception assumes and said order sustaining it decides that it appears affirmatively or in anywise from said answer that said corporation of Kansas or said receiver complainant had or has legally established and is entitled to collect a water rental of \$7.00 per acre per annum for the irrigation of the lands of the defendants or any of them.

And that there is further error apparent in said order, in that it sustained the part of said exception charging that the defendants (your orators) had no standing in said court and cause to contest the reasonableness of the rate of \$7.00 per acre per annum demanded by complainant, but that their remedy, if any they have, is to apply to the board of supervisors of the county in which their said land is situated to fix and establish the rates to be paid for such water.

That the order sustaining said exception is error apparent, in that it so construed and applied to this cause the statute of California approved March 12, 1885, referred to in the bill of complaint, as that said statute operated and operates to deprive each of your orators of his and her and its water rights, easements, and servitudes and of the right to enjoy the same at the rate of \$3.50, actually established and collected by said corporation and as established by the contracts, all as in said answer set forth and all without due process of law, and to deprive your orators of their liberty to contract for their said water rights, easements, and servitudes without due process of law, and to deny to each of your orators the equal protection of the laws, all in contravention of section one, article XIV, of the amendments to the Constitution of the United States, and article five of the amendments to the Constitution of the United States, and that said order is error apparent, in that it so construes said statute as that the same conflicts with article one, section I, of the Constitution of the State of California, and with section nine (9) of article 20 of the Constitution of the State of California.

*Error in Sustaining Sixth Exception.*

112      Seventh. That there is error apparent in the said order of November 22, 1897, in so far as it sustains the exception numbered sixth of the exception filed September 22, 1897, for that it was not competent to raise upon exception to the answer the ques-

tion whether it shows on its face that complainant is legally or equitably entitled to charge and collect the rate of \$7.00 per acre for the irrigation of the lands of your orators or whether said raised rate is reasonable and just.

And for that the facts set forth in said answer do not sustain the charge set forth in said exception and sustained by said order.

Eighth. That there is error apparent in the aforesaid order made and entered on the 6th day of December, 1897, substituting the San Diego Land & Town Company of Maine as complainant in place of the original complainant, Charles D. Lanning, receiver of the San Diego Land & Town Company of Kansas, in that said order was irregular and not in accordance with the practice prescribed by rule 57 of rules of practice for the court of equity of the United States, and that thereby your orators, as defendants to said bill, were denied opportunity to demur, plead, or answer to any supplemental bill setting forth any alleged interest in said cause of the San Diego Land & Town Company of Maine.

Ninth. That there is error apparent in the aforesaid order entered in said cause on the 3rd day of January, 1898, that complainant's bill of complaint be taken *pro confesso* for want of an answer against your orators, defendants to said bill, in this:

That, notwithstanding the sustaining of the exceptions for immateriality, irrelevancy, and impertinence to all those parts of said answer set forth in the exception numbered first and the expunging of the same, the admissions, denials, and averments in the 113 answer not excepted to raised material issues in said cause, and that the said order is not warranted by the course of practice in equity or by any equity rule whereby your orators were deprived of a hearing upon the merits of said cause.

#### *Errors Apparent in Decree.*

Tenth. That no decree in favor of the complainant ought to have been made or granted on the bill of complaint, for that the decree is not warranted by the allegations of the bill of complaint.

Eleventh. That the decree in said cause is, upon the allegations of the bill of complaint, against the statute law of the State of California entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in this," &c., &c., as approved March 12, 1885, and as amended by the act of the law of said State approved March 2, 1897, in this—

That it appears on the face of said bill that the San Diego Land & Town Company of Kansas at the time when it commenced to furnish water to consumers, to wit, in the year 1887, established the annual rate of \$3.50 per acre for irrigation, and that said corporation and C. D. Lanning, as its receiver, from said date continually maintained and collected said rate and no more from all consumers and at no time collected any other rate, and that said rate at the time of filing said bill was and at the date of said decree remained the only actual rate established and collected by said corporation or its said receiver, and that it further appears by the said bill that

the board of supervisors of the county of San Diego mentioned in the complaint had not fixed or established rates of yearly rental at which said San Diego Land & Town Company should furnish water to consumers.

And that by the said statute law it was and is provided that until such rates should be so established by such board of supervisors the actual rates established and collected by every such cor-

poration should be deemed and accepted as the legally  
114 established rate thereof, and that said statute law further provided and provides that every such corporation furnishing water to lands, as did said Kansas corporation to the defendants (your orators), as alleged in said bill, shall furnish such waters at rates not exceeding the established rates as fixed and established by such corporation as provided in said act, and that said statute provided and provides that every such company shall be obliged to furnish such water at the established rates regulated and fixed therefor as in said act provided to the extent of the actual supply of the waters of such corporation.

That by said decree your orators, defendants in said action, are deprived of the use of water from said system for irrigation at the rate actually established and collected by the San Diego Land & Town Company of Kansas at the time when your orators respectively became owners of their water rights and at the only rates at any time actually established and collected by said corporation or its receiver prior to and since said vesting of the said water rights, to wit, at the rate of \$3.50 per acre per annum.

Twelfth. That the decree in said cause, upon the allegations of the said bill, is against the rights of your orators, named as defendants to said bill, in that said bill of complaint shows upon its face that your orators are the owners respectively of tracts of land under the water system of said San Diego Land & Town Company of Kansas, and that your orators own and hold small tracts of land of only a few acres each, and said bill further shows that each of your orators respectively had become and was the owner of a water right to such part of the water appropriated and stored by said company as is necessary to irrigate his tract of land, subject to such yearly rental as said company was entitled to charge.

That it further appears on the face of said bill that the  
115 annual expense of operating and keeping in repair the reservoir and water system of said company and of furnishing all consumers under said system is, exclusive of interest on the bonds of said company, the sum of \$12,034.99.

That it further appears from said bill that the annual income from water rates collected under said system was \$25,715.00.

And that the rate actually established and collected by said company for furnishing water for irrigation of the lands of your orators and *his* codefendants named in said bill under their said water rights was \$3.50 per acre per annum, and that the proceeds of the same enters into the aggregate annual income of said water system.

And notwithstanding the said bill shows that said company and the said C. D. Lanning, the receiver of said company, the complain-

ant thereon, gave notice to your orators, defendants to said bill, that from and after January 1, 1896, they would demand a rental of \$7.00 per acre per annum for water for irrigation, being twice the rate up to that time actually established and collected by said company or its receiver for furnishing your orators with such water, and notwithstanding that said bill further shows that because your orators and each of them refused to pay said rate of \$7.00 per acre, and maintained that neither said land & town company nor said C. D. Lanning, as receiver thereof, had any legal right to increase the amount of rental to be paid by them or any of them, and maintained that the rate of \$3.50 established and collected by the said land & town company must be and remain the established rate of rental, the said receiver, in order to enforce the payment of said increased rentals, caused the said water to be shut off from the premises of the defendants and each of them, and did deprive your orators, defendants in said action, of the use and enjoyment  
116 of their said water rights upon payment of the rates of \$3.50 per acre per annum actually established and collected by said corporation and collected by said receiver.

Yet that the decree herein erroneously holds, decides, and decrees that said San Diego Land & Town Company of Kansas and Charles D. Lanning, receiver thereof, had the right to increase the amount of the water rentals of said company for water furnished to the lands of said defendants from \$3.50 per acre per annum to the sum of \$7.00 per acre per annum without the consent of any of your orators, and erroneously holds, decides, and decrees that your orators shall be required to pay to the San Diego Land & Town Company of Maine said rate of \$7.00 per acre per annum for water furnished to their lands, as set forth in the said bill of complaint, from and after the first day of January, 1896, until the fixing and establishing of such rates by the board of supervisors of San Diego county, California, or the re-establishment thereof in accordance with law as a condition upon which water should be furnished them from said water system, and erroneously holds, decides, and decrees that the San Diego Land & Town Company of Maine is authorized to shut off the supply of water for irrigation of such lands of any of your orators, the defendants to said bill, who should fail for five days to make such payment of arrears of said increase of water rate.

Whereby your orators, the said defendants, are deprived of all benefit of the ownership of their water rights and, notwithstanding said ownership, are required as a condition to the enjoyment of their said easements to pay to said San Diego Land & Town Company of Maine an annual rate to yield, as appears by said bill, an excess over and above the actual cost of repairs, operation, and management of said water system as and for interest and net revenue upon the whole cost and value off said system and without regard to the servitudes thereon owned by your orators.

117 Thirteenth. That the decree in said cause, on its face and on the face of said bill, enforces legislation of the State of California so construed as that it is in violation of sec. one (1) of

article 14 of the amendments of the Constitution of the United States, in that the legislation so construed and enforced maintains the San Diego Land & Town Company of Kansas and C. D. Lanning, its receiver, in increasing the water rentals for water furnished to the lands of your orators for irrigation of their respective lands from \$3.50 per acre per annum to \$7.00 per acre per annum for such irrigation without the consent of your orators, and in that said legislation, so construed and enforced, justifies and maintains the said Kansas corporation and the said receiver and the San Diego Land & Town Company of Maine in having shut off the flow and use of the water under the water rights owned by the defendants to said bill from the lands of such defendants (your orators), as shown in said bill, for refusal to pay such increase of rate, and in that said legislation, as so construed and enforced, requires your orators to pay the San Diego Land & Town Company of Maine the rate of \$7.00 per acre per annum for water furnished their lands, as set forth in said bill of complaint, from and after January 1, 1896, as the condition upon which water shall be furnished them from said water system, and that the legislation so construed and applied authorizes said last-named corporation to shut off the supply of water to any defendant who shall for five days fail to pay such increase of rate; by which means each of your orators is deprived of his, her, and its property without due process of law, and each is likewise deprived of the equal protection of the laws, and each is likewise without due process of law deprived of his, her, and its liberty to purchase or otherwise acquire the water rights in the complaint referred to, and is deprived of his, her, and its liberty to have the benefit of any acquisition, as in the complaint set forth, of such water rights.

And that said decree, for the same reasons, is in contravention of article V of the amendments to the Constitution of the United States, as being an exercise of the judicial power of the United States, whereby your orators are deprived of their property without due process of law, and whereby they are deprived without due process of law of their liberty to contract and acquire property.

Fourteenth. That there is error apparent in said decree in that it was entered *pro confesso* and without proofs upon the allegations of the bill, and without regard to the unexpunged portions of the answer, and without regard to the portions of the answer expunged on said exceptions filed September 22, 1897, and because it ruled, in conformity to the opinion filed in said action Sept. 14, 1896, adopted by and referred to in said decree, that notwithstanding the alleged fact that \$3.50 per acre per annum was the only rate for water supplied for irrigation that had been established and collected by said San Diego Land & Town Company of Kansas or said Charles D. Lanning, receiver, that said San Diego Land & Town Company and Charles D. Lanning, receiver, had the right to increase the amount of the water rentals of said company for water furnished to the lands of defendants (your orators) from \$3.50 per acre per annum to the sum of \$7.00 per acre per annum for such irrigation, and that the contracts with respect to the rates of \$3.50 per acre per

annum, set forth in the answer, were void, as being in conflict with the constitution and laws of the State of California, and because it rules that your orators had no right to be heard before the court on the question of the reasonableness of the rates of \$7.00 per acre per annum, which the complainant in said action sought to enforce and which said decree enforces, and because it rules that the defendants to said bill of complaint (your orators) were not entitled,

upon the question of the rightfulness and lawfulness of the  
119 increase of the rate of \$3.50 per acre per annum to \$7.00 per acre per annum, to have any benefit of the ownership of their respective water rights, as set forth in the bill of complaint, or of their freehold easements and servitudes upon said company's water system, as set forth in their answer, nor of the alleged fact that each had paid or made satisfaction to said San Diego Land & Town Company of Kansas for the price demanded by it for his, her, and its such water right, easement, and servitude.

That in point of law, among other things, said errors are, to wit:

1st. Said decree in said respects erroneously construes and applies the provisions of the constitution and laws of the State of California referred to in the bill of complaint and answer.

2nd. That said provisions of the constitution and laws, as so construed and applied by said decree, are in contravention and repugnant to article XIV, sec. 1, of the amendments to the Constitution of the United States, as depriving your orators of their property without due process of law, and as depriving them of their liberty of contract without due process of law.

3rd. That in applying the said provisions of the State constitution and statutes, as so construed by said decree and the opinion referred to therein, the judicial power of the United States was exercised in contravention of article V of the amendments to the Constitution of the United States, and deprived the defendants in said action (your orators) of their property without due process of law and of their liberty of contract without due process of law.

4th. And that the provisions of article XIV of the constitution of the State of California, as so construed, applied, and enforced by said decree, are in violation of the guarantee, by section IV of article IV of the Constitution of the United States, of a republican form of government to said State of California, in that

by said provision of the constitution of said State, as so construed, applied, and enforced, the said State assumes the absolute control of all water appropriated and devoted to sale, rental, and distribution, and the absolute control of all works devoted to the supplying or distribution of such waters; abolishes all capacity for the acquisition of private property rights, easements, or servitudes in such water supply and water works; abolishes all right to unite the ownership of any water supply from any such system with the ownership of lands for irrigation thereof by contract of purchase and payment or otherwise; abolishes all right or capacity for the acquisition of any water right, easement, or servitude in or upon any such water system, by purchase or otherwise, free from the perpetual obligation to pay net revenue, as the said statute now stands, of not less than six nor

more than eighteen per cent. per annum upon the cost or value of such water system, and abolishes all right or capacity to ascertain, fix, and define by contract or convention the rate or compensation to be paid by any consumer for the supplying of any such waters for irrigation of land.

Fifteenth. That there is error apparent in said decree in that said decree is made in favor of the San Diego Land & Town Company of Maine, although said corporation has not become a party to the record in said cause by supplemental bill or otherwise; and what interest, if any, said corporation hath or had in said action does not appear upon the record, nor was any claim on its part to any interest so set forth that the defendants to said bill of complaint, your orators, could in anywise make answer thereunto or plead thereunto.

Sixteenth. That there is error apparent in said decree in that this court was without jurisdiction to entertain said cause or to make any decree upon the merits therein.

121 Seventeenth. That there is error apparent in the said order of the court made on the 3rd day of January, 1898, denying the motion of defendants in said cause to dismiss said suit and in retaining the jurisdiction thereof after the discharge of C. D. Lanning, receiver, the complainant therein, made by order of the court on the 6th day of December, 1897.

Amended by order of court December 5th, 1898. Wm. M. Van Dyke, clerk.

Wherefore, as said errors appear on the face of the record and are greatly prejudicial to complainants and [his]<sup>\*</sup> <sup>their</sup> rights in the premises, complainants pray that said decree may be reviewed, reversed, and set aside and no further proceedings taken therein; and to that end complainants pray process by subpoena against the San Diego Land & Town Company of Maine, requiring it to appear and answer hereunto and show cause, if it may, why said decree should not be reviewed, reversed, and set aside, and such further orders and decrees be made as to the court may seem just, including the restoration to your orators of the sum of money paid under said decree as aforesaid.

C. H. RIPPEY AND  
HAINES & WARD,  
*Solicitors for Complainants.*

(Endorsed.) Circuit court of the United States, ninth circuit, southern district of California. H. C. Osborn *et al.*, complainants, vs. San Diego Land & Town Company of Maine, defendants. Bill of review. C. H. Rippey, Haines & Ward, solicitors for complainants. No. 839. U. S. circuit court, southern district of California. H. C. Osborne *et al.* vs. San Diego Land & Town Company of Maine. Bill of review. Filed Aug. 12, 1898. Wm. M. Van Dyke, clerk. E. H. Owen, deputy clerk.

[\*Word enclosed in brackets erased in copy.]

122 In the Circuit Court of the United States, Ninth Circuit,  
Southern District of California.

H. C. OSBORNE ET AL., Complainants,

*vs.*

SAN DIEGO LAND AND TOWN COMPANY OF MAINE, Defendant. }

The defendant moves the court to strike the bill of complaint in the above-entitled suit from the files of said court and to dismiss said suit on the ground that the decree in the suit of San Diego Land and Town Company of Maine *vs.* H. C. Osborne *et al.*, mentioned and set forth in the said bill of complaint and sought to be reviewed herein, has not been performed or complied with, nor has leave been obtained from this court for the complainants to prosecute this suit without performing or complying with said decree.

WORKS & WORKS,

WORKS & LEE,

*Solicitors for Defendant.*

The complainants are hereby notified that on the 5th day of September, 1898, at 10.30 o'clock a. m., or as soon thereafter as counsel can be heard, the defendant, San Diego Land and Town Company of Maine, will, at the court-room of said court, in the Federal building, in the city of Los Angeles, State of California, move said court as set forth in the above and foregoing motion.

Said motion will be made on the grounds set forth therein, and will be based upon the pleadings, minutes, proceedings, and decree in the said case of San Diego Land and Town Company of Maine, substituted instead of Charles D. Lanning, receiver, *vs.* H. C. Osborne *et al.*, bill of complaint in this suit of H. C. Osborne *et al.* *vs.*

San Diego Land and Town Company of Maine, and the affidavit of John E. Boal, copy of which is served with this notice.

WORKS & WORKS,

WORKS & LEE,

*Solicitors for Defendant.*

124 In the Circuit Court of the United States, Ninth Circuit,  
Southern District of California.

H. C. OSBORN ET AL., Complainants,

*vs.*

SAN DIEGO LAND & TOWN COMPANY, Defendant. }

John E. Boal on his oath says that he is the general manager of the defendant in the above-entitled case; that it is adjudged and decreed in the final decree made and entered in the case of San Diego Land & Town Company of Maine *vs.* H. C. Osborn *et al.*, set forth in the bill of complaint herein, as follows:

"That the said defendants be, and they are and each of them is hereby required to pay to the complainant said rate of \$7.00 per acre per annum for water furnished their lands, as set forth in the bill of

complaint herein, from and after the 1st day of January, 1896, until the fixing and establishing of such rates by the board of supervisors of San Diego county, California, or the re-establishing thereof in accordance with law.<sup>3</sup>

That the complainants herein have had and used the waters of the defendant for the irrigation of their lands mentioned and described in the pleadings and proceedings set forth in the bill of complaint herein from the 1st day of January, 1896, until the present time, and have not, as provided in said decree, paid the said rate of \$7.00 per acre per annum therefor, but have paid only the sum of \$3.50 per acre per annum, and have refused and still refuse to pay any greater amount therefor, and have insisted and maintained and do now insist and maintain that said rate of \$7.00 per acre per annum decreed by this court to be the legally established rate is illegal and void.

That the board of supervisors of the county of San Diego, California, did not fix or establish rates to be charged by the defendant herein until the 16th day of October, 1897, nor have the rates fixed by the said San Diego Land & Town Company of Kansas and the receiver of said company, Charles D. Lanning, been re-established in accordance with law.

JOHN E. BOAL.

Subscribed and sworn to before me this 19th day of August, 1898.

[SEAL.]

JERAULD INGLE,  
*Notary Public in and for the County  
of San Diego, State of Calif.*

(Endorsed:) No. 839. U. S. circuit court, ninth circuit, southern district of California. H. C. Osborne *et al.*, complainants, vs. San Diego Land & Town Co. of Maine, defendant. Notice of motion to strike bill from files. Received copy of the within notice Aug. 29, 1898. Haines & Ward, solicitors for complainant. Filed Oct. 27, 1898. Wm. M. Van Dyke, clerk. Works & Works, Wells & Lee, Works & Lee, rooms 420 to 425 Henne building, Los Angeles, Cal., solicitors for defendant.

126 In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

H. C. OSBORN ET AL., Complainants, }  
vs. }  
SAN DIEGO LAND & TOWN COMPANY OF MAINE, De- } Affidavit.  
fendants. }

COUNTY OF SAN DIEGO, }  
State of California, } ss:

Monroe Johnson, being duly sworn, on his oath says—  
That he is one of the complainants in the above-entitled cause and one of the defendants in the suit of The San Diego Land &

Town Company of Maine v. H. C. Osborn *et al.*, numbered 671, mentioned in the bill of complaint and in the motion of defendant herein to strike said bill from the files of the court and dismiss this suit.

That the affidavit of John E. Boal, filed with said motion, does not correctly or truthfully set forth the relief part of the decree in said cause 671, but that said decree is fully and correctly set forth in the bill of complaint herein.

That the water rates to be charged by defendant were fixed and established by the board of supervisors of the county of San Diego, California, on October 16, 1897, as stated in the said affidavit of said Boal, and that the rate so fixed for irrigation was and remains \$3.50 per acre per annum.

That the decree in said cause 671 was entered on March 12, 1898.

That neither this affiant nor, as he is credibly informed and believes, did any other complainant herein and defendant to 127 said decree use any water from said company's system for irrigation after said decree until nearly June 1, 1898.

That on or about March 26, 1898, these plaintiffs, among other consumers, entered into a written agreement with The San Diego Land & Town Company, defendant herein, for the apportionment of the water in said company's reservoir, which was signed by said company and generally by the plaintiffs, a copy of which, except signatures, is shown by "Exhibit A," hereto annexed.

That the average of said apportionment is about one-half the normal supply, and that by said apportionment the plaintiff conceded to the said company as a consumer some of their claims as prior consumers to a full supply and shared the same with said company and others as later consumers.

That thereupon the larger proportion of these plaintiffs bought and the remainder hired meters of said land & town company for measuring to plaintiffs the water pursuant to said agreement for apportionment.

That said company commenced to deliver water for irrigation to plaintiffs and others about said first of June, 1898, through said meters, under and pursuant to said agreement of apportionment and not otherwise, and has exclusively managed and controlled such delivery according to said apportionment ever since, and has actively aided complainants in taking and using such apportioned waters, and that prior to October 1, 1898, the supply of water from said system for irrigation was exhausted, leaving many of the consumers much short of the supply apportioned to them by said agreement, and by that date irrigation ceased.

That none of the complainants since the entry of said decree has had or used any water of the defendant for the irrigation of any of their lands against the will or without the consent of the company or otherwise than with the consent and concurrence of said company and under said written agreement of apportionment, and that since said decree the said company has at all times up to this date

128 sent bills to these complainants for the rental of said water at the rate of \$3.50 per acre per annum, being the full ordinance rate, notwithstanding the short supply and the entire cessation aforesaid, in the form shown by Exhibit "B," hereto annexed, and the complainants have uniformly paid the same and the company has accepted the same.

That none of these complainants have at any time since the signing of said decree used or threatened to use any legal or other compulsion to cause said company to forego the condition prescribed in said decree to its obligation to furnish water to these complainants, but that said company has of its own will and discretion refrained from availing itself of said condition, and has either suspended or waived the same during all the time it has so furnished said water.

That these complainants have not taken, used, or threatened to take or use the waters from said company's system in violation of the condition imposed by said decree, but have, as they believe, in all things obeyed said decree where passive obedience is required by it, and have performed it where it has imposed upon them an unconditional and affirmative duty or command.

That none of these complainants have insisted or maintained or do insist or maintain that said decree shall not be respected and obeyed, or maintain or insist upon any right, except such as they may properly exercise, to have the same reviewed in this court and appellate courts; that neither of them maintain or insist that the rate of \$7.00 per acre per annum decreed by this court to be the legally established rate is illegal and void, as long as said decree remains in force, as is alleged in the affidavit of John E. Boal, but they only by their bill of review herein seek to maintain that there is error apparent in such decree as ground for reviewing and reversing the same.

And affiant for himself and his co complainants avers as ground of appeal to the discretion of the court herein that the complainants, as defendants to the original bill in said cause 671, have presented as a defense the fact that the rate of \$3.50 per acre per annum was

129 the only rate actually established and collected by the San Diego Land & Town Company of Kansas and its receiver, and have submitted in said action that under section five of the act of 1885 such rate was equally binding upon said company, its successor in interest, and these complainants; that they conceive that any voluntary payment by them of the rate of \$7 per acre per annum would be to consent to a change of the rate for irrigation from \$3.50 per acre per annum to \$7.00 per acre per annum, which would then become the rate actually established and collected.

That complainants are apprehensive that the voluntary payment of said rate would deprive them of their standing to insist on review or otherwise that \$3.50 was the only rate actually established and collected.

That whether said position is well or ill founded, it is taken in good faith, and plaintiffs appeal to the discretion of the court that they be not required to change their position in the controversy to their possible detriment as a condition to submitting their bill of review herein.

MONROE JOHNSON.

Subscribed in my presence and sworn to before me, by said Monroe Johnson, this 21st day of October, 1898.

M. L. WARD,

*Notary Public in and for the County of  
San Diego, State of California.*

[SEAL.]

Ninth Circuit, Southern District of California, San Diego County.

STATE OF CALIFORNIA, ss:

We, F. B. Merriam, A. C. Crockett, Ira Howe, W. J. Henderson, and P. B. Smith, each being duly sworn, each for himself says that he has heard the foregoing affidavit of Monroe Johnson read; that he is a complainant in said cause, and is informed and knows concerning the facts deposed to by said Johnson, and that the facts stated in the affidavit by said Johnson are true.

F. B. MERRIAM.  
A. C. CROCKETT.  
IRA HOWE.  
W. J. HENDERSON.  
P. B. SMITH.

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Subscribed and sworn to before me and in my presence this 3rd day of November, 1898.

[SEAL.] M. L. WARD,  
*Notary Public in and for San Diego County, Cal.*

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"EXHIBIT A."

*Agreement.*

E. J. Swayne moved that the form of contract to be submitted to the consumers be as follows and preceded by the agreement of the San Diego Land & Town Company as follows:

The undersigned San Diego Land & Town Company of Maine agrees to the following apportionment of the water in accordance with the following apportionment adopted at the mass meeting of consumers at National City March 26th, 1898, and as consumers we agree to accept and take only our quantity as herein apportioned for the time and in the manner herein provided.

The undersigned consumers of water, under the Sweetwater system, in view of the short visible supply impounded in the reservoir of the system for use the present season, hereby mutually agree to the following apportionment of the supply of water now in the reservoir for irrigation among consumers, such apportionment to apply to water now impounded: said apportionment is as follows:

To trees planted in 1897, 45,000 gals. per acre, which am'ts to.....	2,430,000
To trees planted in 1898, 60,000 gals. per acre, which am'ts to.....	14,220,000
To trees planted in 1895, 72,000 gals. per acre, which am'ts to.....	46,584,000

To trees planted in 1894, 90,000 gals. per acre, which am'ts to.....	33,210,000
To trees planted in 1893, 110,000 gals. per acre, which am'ts to.....	61,600,000
To trees planted in 1892, 135,000 gals. per acre, which am'ts to.....	94,095,000
To trees planted in 1891, 170,000 gals. per acre, which am'ts to.....	131,920,000
To trees planted in 1890, 210,000 gals. per acre, which am'ts to .. . . . .	275,100,000
	659,159,000

Vegetable gardens, nurseries, alfalfa, ornamental trees, and lawns are to be counted as trees planted and receive the same apportionment of water according to trees planted in 1890.

*Exhibit A Continued.*

In case of increase of supply the apportionment to be proportionately increased.

We hereby authorize the San Diego Land & Town Company during the season of 1898 to apportion the said water in accordance with the above schedule and apportionment and to distribute to themselves, as consumers of water, the same proportion that would fall to the lot of any other consumer according to the class to which he belongs.

But it is expressly understood that by this agreement we waive no right as consumers or land-owners as between ourselves or the company beyond granting the license to prorate water, as above, for the present season.

We further agree that the following committee of seven, appointed pursuant to the action of the mass meeting of consumers held March 26, 1898, to wit, R. C. Allen, L. E. Alien, L. W. Goff, D. K. Adams, E. Thelan, E. J. Swayne, and A. Haines, be authorized to represent us in all matters connected with the foregoing agreement and to act as arbitrators in the dispute between consumers or with the company growing out of the same.

SAN DIEGO LAND & TOWN COMPANY,  
By — — —.

*Exhibit A Continued.*

The undersigned agrees to purchase for himself or co-jointly with others the meter or meters required to measure the water apportioned to his or their lands.

Name.	No. of meter.	Size.
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The undersigned herewith applies for meter under ordinance governing same, and agrees that said meter may be available only during the time allotted for delivering the water apportioned.

Name.	No. meter.	Size.
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## EXHIBIT B.

San Diego Land & Town Company, water department.

Checks should be made payable to the order of and all remittances addressed to E. A. Hornbeck, assistant treasurer, National City, Cal.

This company claims that while the amount herein named is in accordance with rates established by board of supervisors, it is inadequate compensation for the water so furnished, and its right and claim to be paid for such water in full at such rates as may be hereafter fixed, pursuant to a decree of court or otherwise, is in no manner waived or compromised by the acceptance of the amount named below.

NATIONAL CITY, CAL., — —, 189—.

Office hours, 8.00 a. m. to 5 p. m.

Saturdays, 8 a. m. to 2 p. m.

DEAR SIR: Your water rent for the — months ending — is now due. Remit by check, if convenient.

Please return this notice.

Register No. —. Amount, —.

Respectfully,

E. A. HORNBECK,  
Assistant Treasurer.

Delinquent after the 15th of current month.

135 (Endorsed:) No. 839. In the circuit court of the United States for the ninth circuit, southern district of California. H. C. Osborn *et al.*, plaintiff, vs. San Diego Land & Town Company of Maine, defendant. Aff'd't on part of complainants, on motion to remove bill of review from the files. Filed Nov. 7, 1898. Wm. M. Van Dyke, clerk. Haines & Ward, corner Fourth and D streets, San Diego, Cal., solicitors for complainants.

136 At a stated term, to wit, the August term, A. D. 1898, of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, held at the court-room, in the city of Los Angeles, on Monday, the 21st day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Erskine M. Ross, circuit judge.

H. C. OSBORNE ET AL., Complainants, <i>vs.</i> SAN DIEGO LAND AND TOWN COMPANY OF MAINE, Defendant.	}	No. 839.
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This cause having heretofore been submitted to the court for its consideration and decision on defendant's motion to strike the bill of complaint from the files and to dismiss said suit, and the court

having duly considered the same and being fully advised in the premises, it is now, on this 21st day of November, 1898, being a day in the August term, A. D. 1898, of said circuit court of the United States for the southern district of California, ordered that said motion to strike the bill of complaint from the files and to dismiss said suit be, and the said motion hereby is, denied.

137 I, Wm. M. Van Dyke, clerk of the circuit court of the United States for the southern district of California, do hereby certify the foregoing to be a full, true, and correct copy of an original order made and entered by said court November 21st, 1898, in the cause entitled H. C. Osborne *et al.*, complainants, vs. The San Diego Land and Town Company of Maine, defendant, No. 839, and remaining of record therein.

[SEAL.] Attest my hand and the seal of said circuit court this 5th day of December, A. D. 1898.

WM. M. VAN DYKE, Clerk.

(Endorsed:) No. 839. U. S. circuit court, ninth circuit, southern district of California. H. C. Osborne *et al.* vs. San Diego Land & Town Company of Maine. Certified copy of order denying motion to strike bill from files. Filed Dec. 5, 1898. Wm. M. Van Dyke, clerk.

138 In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

H. C. OSBORNE ET AL., Complainants,

{  
vs.

SAN DIEGO LAND AND TOWN COMPANY OF MAINE, Defendant.

The defendant, The San Diego Land and Town Company of Maine, by protestation, not confessing or acknowledging all or any of the matters or things in the amended bill of complaint contained to be true in such manner or form as therein set forth and alleged, presents and files this its demurrer to the said bill, and for cause of demurrer shows:

1. That it appears by the complainants' own showing in said bill that there is and was no error in the proceeding or decision of said court in the case of Charles D. Lanning, receiver of the San Diego Land and Town Company, *vs.* H. C. Osborne, mentioned and set forth in the bill herein, appearing on the face of the record or otherwise.

2. That it appears from the complainants' own showing in their said bill that they are not nor are any of them entitled to the relief prayed for in their said bill or any relief.

3. That it appears from their own showing by their said bill that there is no such error appearing on the face of the proceedings in the said suit of Lanning, receiver, *vs.* H. C. Osborne *et al.* or otherwise as can be relieved against by bill of review or a bill in the nature of a bill of review.

139      4. That it appears from the complainants' own showing by their said bill that the remedy of the complainants, if any they have, is by appeal and not by bill of review.

Wherefore, and for divers other good causes of demurrer appearing in said bill, the said defendant, here demurring, demurs thereto, and it prays the judgment of this honorable court whether it should be required to make any answer to the said bill, and it prays to be hence dismissed with its reasonable costs in this behalf sustained.

WORKS & WORKS,  
WORKS & LEE,  
*Solicitors for Defendant.*

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

WORKS & WORKS,  
WORKS & LEE,  
*Solicitors for Defendant.*

STATE OF CALIFORNIA, }  
County of San Diego, }<sup>ss:</sup>

John E. Boal, being duly sworn, says he is the general manager of the defendant in the action mentioned in the foregoing demurrer, and that said demurrer is not interposed for delay.

JOHN E. BOAL.

Subscribed and sworn to before me this 25th day of November, 1898.

LEWIS R. WORKS,  
[SEAL]      *Notary Public in and for the County of  
San Diego, State of California.*

(10c. int. r. v. stp.)

140      (Endorsed :) No. S39. U. S. circuit court, ninth circuit, southern district of California. H. C. Osborne *et al.*, complainants, *vs.* San Diego Land and Town Company of Maine, defendants. Demurrer to bill. Received copy of the within demurrer Nov. 25th, 1898. Haines & Ward, solicitors for complainant. Filed Nov. 26, 1898. Wm. M. Van Dyke, clerk. Works & Works and Works & Lee, rooms 420 to 425 Henne building, Los Angeles, Cal., solicitors for defendant.

141      At a stated term, to wit, the August term, A. D. 1898, of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, held at the court-room, in the city of Los Angeles, on Monday, the 28th day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Erskine M. Ross, circuit judge.

ception to the answer and the ruling thereby that the defendants could not be heard before the court, to contest the reasonableness of the demanded increase of rate to \$7.00 per acre, per annum, erroneous; and was it an infringement of the vested rights of the defendants, for the court, by its decree to enforce such increased rate, while declining to adjudicate whether it was reasonable or just?

#### **QUESTIONS OF PRACTICE AND PROCEDURE.**

Among the questions of procedure presented are the following, viz:

1. Does the bill of review lie herein?
2. Was it permissible in the equity practice, to question the validity of the affirmative defenses set forth in the answer, by the exception *first*, for impertinency; and was it error in point of procedure for the court to expunge such affirmative defenses from the record by its order sustaining that exception; and to proceed thereafter to render its decree as upon the bill confessed?
3. Was it erroneous for the court to treat the paragraphs entitled "exceptions" numbered *third*, *fifth* and *sixth* (trans. p. 60) as exceptions in any sense known to the equity practice and to sustain them accordingly; or was the effect of the submission made on the claims stated in such *third*, *fifth* and *sixth* paragraphs, a setting down of the cause upon bill and answer; and is it to be treated as disposed of accordingly?

4. Was it error for the court to treat the paragraph numbered "second" (trans. pp. 59, 60), under the entitled "exceptions", an exception in substance or form, in any sense known to the equity practice and to sustain it as such?

5. Is the exception numbered "fourth" (trans. p. 60) sufficient in form or substance, to raise any question of sufficiency of the answer; and was it error for the court to sustain the same?

6. Notwithstanding that the "exception" numbered *first* for impertinency was sustained, and in view of the character of the remaining "exceptions", was it error to render the decree *pro confesso*, in disregard of the issues raised by the unexpunged denials, admissions and averments remaining in the answer?

7. Did the San Diego Land & Town Company of Maine become a party to the record so that it was competent to make a decree in its favor?

8. As to jurisdiction there is presented the question, whether this cause is one of which the Circuit Court had cognizance, either original, or as ancillary to the cause in which the receiver was appointed?

#### **SPECIFICATIONS OF ERROR.**

First. Because the court sustained the first assignment of the demurrer to the said bill of review.

Second. Because the ~~court~~ sustained the second assignment of the demurrer to the said bill of review.

Third. Because the court sustained the third assignment of the demurrer to said bill of review.

Fourth. Because the court sustained the fourth assignment of the demurrer to said bill of review.

Fifth. Because the court, by its ruling upon said demurrer and its decree herein, overruled the first assignment of error set forth in said bill of review.

And thereby erroneously ruled and adjudged that the exceptions filed September 22, 1897, in said original cause, to the further and supplemental answer filed Sept. 13, 1897, raised for decision the merits of the defenses set forth in the answer; that said exceptions were properly sustained, and that said further answer and supplemental answer was properly expunged from the record, and was properly not to be considered on the final hearing of said cause, and that said cause was properly not set down for hearing on bill and answer, or tried on issues joined and proofs made.

Sixth. Because the court, by its ruling upon said demurrer and by its decree herein, overruled the second assignment of error set forth in said bill of review.

And thereby erroneously ruled and adjudged that the court in said original cause properly ruled and held upon the first exception to said answer, among other things erroneous, the following, to-wit:

That all of the allegations of said further answer and supplemental answer setting forth that the waters and water system of the San Diego Land & Town

Company of Kansas were its private property were immaterial, irrelevant, and impertinent.

And that all the allegations of said answer setting forth that said corporation, by the contracts, agreements, conveyances, transfers, acts, representations, classifications, and admissions made by it and made under the circumstances, all as in the answer set forth, did grant to and vest in your orators and did recognize and acknowledge their water rights and freehold easements of the flow and use of water from said water system as appurtenant to lands owned respectively by your orators and as constituting corresponding freehold servitudes on said company's water system were immaterial, irrelevant, and impertinent, and that they were so in virtue of the Constitution and laws of the State of California.

And that all the allegations of said answer setting forth that all claims and demands of said company for the price or compensation for said water rights, easements, and servitudes, had been paid or otherwise satisfied were immaterial, irrelevant, and impertinent, and that all such freehold water rights, easements, and servitudes were void, and in conflict with the Constitution and laws of said State.

And that all the allegations of said answer setting forth the representations, agreements, and contracts, made by said corporation of Kansas to and with each of your orators, fixing the water rate for irrigation of their lands under their respective water rights, ease-

ments, and servitudes at the rate of \$3.50 per acre, per annum, were irrelevant, immaterial, and impertinent,, and that any such contracts or agreements are in conflict with the Constitution and laws of the State of California and void, and that all such allegations of the contractual fixing of water rates in connection with all such allegations of water rights, easements, and servitudes were altogether impertinent in defense to the demand of said corporation and its said Receiver, to increase without the consent of your orators the rate of \$3.50 per acre, per annum, for irrigation of their lands to \$7 per acre, per annum.

And that all the allegations of said answer setting forth that the rate of \$3.50 per acre, per annum, for irrigation of the lands of your appellants was the only rate which had ever been actually established and collected by said corporation were immaterial, irrelevant, and impertinent.

And that the allegations that your appellants were induced to purchase, improve, and settle upon their respective tracts of land in reliance upon said established rate of \$3.50 per acre were immaterial, irrelevant, and impertinent.

And that the allegations that your appellants had for more than five years held and enjoyed the use of said water upon their land for irrigation purposes at said annual rate of \$3.50 per acre, and that the right to have and enjoy the use of said water at said rate became vested in your appellants respectively by opera-

tion of the statue of limitations of the State of California, were immaterial, irrelevant, and impertinent.

And that all the allegations of said answer setting forth the total irrigating capacity of said water system and the proportion of the same not used and all the other facts and circumstances pertaining to the reasonableness of said increase of rate set forth in said answer were irrelevant, immaterial, and impertinent to be answered to such demanded increase.

And that the denial that said corporation was entitled to demand from your appellants water rentals beyond \$3.50 per acre, per annum, to apply upon the demanded net income of six per cent, per annum, was immaterial, irrelevant, and impertinent.

And that the denial that the compensation to said corporation for either of your appellant's respective water rights, easements, and servitudes, was, or still is, subject to regulation by any Board of Supervisors of said State, as provided in said Act of 1885, was irrelevant, immaterial, and impertinent.

And that the denial that at the said rate of \$3.50 per acre, per annum, for irrigation, together with rates for domestic use, if water should be demanded and used upon the whole of the land which the said system is able to supply with water, said company would not be able to pay its operating expenses and maintain from such rentals its plant and system, and the denial that by reason of said established rate said company was

losing money, and the denial that the plant of said company is going to decay, without sufficient resources from said rate for replacing the same, and that the denial that said company at said rate of \$3.50 will be compelled to furnish water to consumers at any loss, or that, if said rate of \$3.50 is maintained, said system will be lost, are immaterial, irrelevant, and impertinent.

And that the allegations of the requirements as a condition to the refraining by said company and its Receiver, from shutting off the supply of water to each of your orators under their respective water rights and asements, that your orators should subscribe and execute the agreement, designated "Application for water," set forth in the answer, *was* immaterial, irrelevant, and impertinent.

And that the denial that any increase of the said rate of \$3.50 is at all necessary to enable said corporation, or its Receiver, to maintain and operate said water plant, and pay the expenses of the maintenance and operation thereof, is irrelevant, immaterial, and impertinent.

That the allegations relating to the amount in controversy as to each of your orators and as affecting the jurisdiction are irrelevant, immaterial, and impertinent.

And that the allegations of the answer which rely upon and invoke the application of the provisions of

Section 1 of Article XIV and of Article V of the amendments to the Constitution of the United States, and which rely upon and invoke the application of Section 1 of Article I and of Section 9 of Article XX of the Constitution of the State of California, and which rely upon and invoke Section 11 1-2 of the amendment of the act of March 12, 1885, of the State of California, set forth in said answer, and each of them, are immaterial, irrelevant, and impertinent.

Seventh. Because the court, by its ruling upon said demurrer, and by its decree herein, overruled the third assignment of error set forth in said bill of review.

And thereby erroneously ruled that the court properly ruled in the original cause, upon exception second to the answer, that the said answer was evasive and uncertain in that it did not show which of the defendants to said original cause acquired their water rights from the San Diego Land & Town Company of Kansas by purchase, and how much they paid therefor to said company, although the bill of complaint in said original action alleges that each of the defendants thereto was the owner of a water right by purchase or otherwise, and alleges that each of the defendants thereto was the owner of a water right by purchase or otherwise, and alleges no distinction or discrimination between such rights, whether acquired by purchase or otherwise, and calls for no answer as to which became owners of such rights by purchase or which became owners otherwise, and although said answer shows

that the water rights, easements, and servitudes, however acquired, are each in freehold, that each was created by said corporation of Kansas, and that compensation for each has been paid, or that satisfaction has otherwise been made to said corporation for the same.

Eighth. Because the court, by its ruling upon said demurrer and by its decree herein, overruled the fourth assignment of error set forth in said bill of review.

And thereby erroneously ruled and adjudged that the court in the original cause correctly sustained the third exception to the said answer, and erroneously reaffirmed the ruling on said exception that it is admitted by said answer that the actual and just cost of the water works and system of the said San Diego Land & Town Company of Kansas is \$750,000, and erroneously reaffirmed the ruling on said exception that it affirmatively appears from said answer that the annual rental of \$7 per acre will not, and cannot, realize to the San Diego Land & Town Company of Maine six per cent net increase per annum on its investment.

And erroneously reaffirmed the ruling on said exception that the law of the State of California allows said company as against these appellants, defendants to the original bill, as a reasonable return on their investment, not less than six nor more than eighteen per cent net on the value of said plant and system, without regard to the water rights, easements, and

servitudes acquired by each of said defendants from said San Diego Land & Town Company of Kansas, and owned by them respectively as set forth in the said answer, and without regard to the agreements of said company with your orators as to the annual rate of 3.50 per acre, per annum, and without regard to the of \$3.50 per acre, per annum, established by said corporation at the time when said water rights, easements, and servitudes respectively rested in said defendants, and ever since collected, all as set forth in said answer.

Ninth. Because the court, by its ruling upon said demurrer and by its said decree, overruled the fifth assignment of error set forth in said bill of review.

Whereby it erroneously reaffirmed the former ruling sustaining the fourth exception to said answer that said exception was sufficient in form to point out to and inform the defendant what matters in said original bill were not well or sufficiently answered or respecting which the denials or averments of the said answer are evasive, imperfect, or insufficient.

Whereby it erroneously reaffirms its ruling suspensions, admissions, or averments in said answer are evasive, imperfect, and insufficient.

Tenth. Because the court, by its ruling upon said demurrer, and by said decree, overruled the sixth assignment of error set forth in said bill of review.

And whereby it erroneously reaffirms is ruling sus-

taining the exception numbered fifth to the answer that the question whether it appears from the answer of the defendants that the complainant Receiver has legally established and is entitled to collect the water rental of \$7 per acre, per annum, for the irrigation of the lands of each of the defendants respectively, is properly triable upon exception to the answer.

And whereby it erroneously reaffirms its ruling that it appears affirmatively or otherwise from said answer that said corporation of Kansas and the said Receiver, complainant, had or has legally established and is entitled to collect a water rental of \$7 per acre, per annum, for the irrigation of the lands of the defendants or any of them.

And whereby it erroneously reaffirms its ruling that the said defendants had no standing in said court to contest the reasonableness of the rate of \$7 per acre, per annum, demanded by the complainant to such original bill, but that their remedy, if any they had, was to apply to the Board of Supervisors of the county in which their said land is situated, to fix and establish the rates to be paid for such water.

And whereby it erroneously reaffirms its ruling in so construing and applying to this cause the statute of California approved March 12th, 1885, referred to in the original bill of complaint, as that said statute operated and operates to deprive each of said defendants of his, her, and its water rights, easements, and servitudes, and of the right to enjoy the same at

the rate of \$3.50 per acre, per annum, actually established and collected by said corporation and as established by the contracts, all as in said answer set forth and all without due process of law, and to deprive said defendants of their liberty to contract for their said water rights, easements, and servitudes without due process of law, and to deny to each of said defendants the equal protection of the laws, all in contravention of Section 1, Article XIV, of the amendments to the constitution of the United States and Article V of the amendments to the constitution of the United States, and erroneously rules that said statute so construed is not in conflict with Article I, Section 1, of the Constitution of the State of California and is not in conflict with Section nine (9), Article twenty (20), of the Constitution of the State of California.

Eleventh. Because the court, by its ruling upon said demurrer, and by its decree, overruled the seventh assignment of error set forth in said bill of review.

And whereby erroneously reaffirms its ruling on the sixth exception to the said answer; that such exception did properly raise and present the question whether said answer shows on its face that complainant is legally or equitably entitled to collect the rate of \$7 per acre for irrigation of the lands of said defendants, and whether said raised rate was reasonable and just.

And erroneously reaffirms its ruling that the facts

set forth in said answer sustain the charge set forth in said sixth exception.

Twelfth. Because the court, by its ruling upon said demurrer and by its decree, overruled the eighth assignment of error set forth in said bill of review.

Whereby it erroneously ruled that the order made and entered December 6, 1897, in said original cause substituting the San Diego Land & Town Company of Maine, as complainant, in place of the original complainant, Charles D. Lanning, Receiver of the San Diego Land & Town Company of Kansas, was not irregular nor in disregard of rule 57 of the rules of practice of the courts of equity of the United States; and further erroneously overruled and disallowed the showing of error that by virtue of said order of substitution the said defendants to said original bill were denied opportunity to demur, plead, or answer to any supplemental bill setting forth any alleged interest in said cause of the San Diego Land & Town Company of Maine.

Thirteenth. Because the court, by its ruling upon said demurrer and by its decree, overruled the ninth assignment of error set forth in the bill of review.

Whereby the court erroneously reaffirmed its order, entered in said cause January 3, 1898, that the original bill of complaint be taken *pro confesso* against said defendants for want of an answer for that, notwithstanding the sustaining of the exceptions for immateriality, irrelevancy, and impertinence to all those

parts of the answer set forth in exception numbered first and the expunging the same, the admissions, denials, and averments in the answer not excepted to raised material issues in said cause; that such remaining admissions, denials, and averments of said answer show in substance that said San Diego Land & Town Company of Kansas was the owner of a water system and franchise, as set forth in its articles of incorporation, shown in the answer; that said corporation completed its said system in Feb., 1888; that how much money said company expended up to January 1, 1896, in acquiring and constructing said system the defendants had no knowledge, information, nor belief.

That the right and title of said company to its said water system is subject to the rights of the defendants respectively as follows: That each defendant owning land, as alleged in the complaint, has become the owner of a water right and a part of the water appropriated and stored by said company necessary to irrigate his and her land; that such water rights extend not only to the irrigation of the defendants' respective tracts of land, but also to supplying the needs of the persons resident and animals kept thereon respectively.

That each said water right embraces the right and easement of the service of the reservoir and distributing system of said corporation for the delivery of water at and upon said respective tracts of land for all uses by automatic gravity pressure existing under said system and including the right to have said corporation maintain said system efficiently to conduct

the water to and deliver the same on the premises of each of the defendants for irrigation and other uses at and for the annual rates to be deemed and accepted as the legally established rates therefor.

That at the times mentioned in the bill of complaint said company was furnishing the defendants and each of them with water through its said system; that said company has at all times treated its lands under irrigation from said system as being on precisely the same footing as to annual rates with the lands of each of the defendants and has entered upon its books the same rate per acre per annum chargeable to its own lands as that charged to the lands of defendants; that said Receiver has done likewise.

That the annual expense of said corporation to operate and maintain its water system does not exceed the sum of \$12,034.99.

That said company commenced to furnish water to consumers regularly in February, 1888; that in said month of February, 1888, it fixed and established and has since charged the rate of \$3.50 per acre as the annual rate for irrigation and no more until January 1, 1896.

That in order to pay the company the amount of its expenses and an annual income of 6 per cent upon the whole present cost and present value of its water system it is not necessary that the rates for water sold and consumed should exceed the sum of \$32,000 per annum; that the present cost and the present cash

value of the property constituting said water system does not exceed the sum of \$300,000, and that not over one-half of the capacity of said system was on January 1, 1896, in use.

And that not over two-thirds of the capacity of said system was in use when said answer was filed.

That in order to pay the cost of operating the plant of said company and maintain the same and pay said company as much as 6 per cent net annual revenue upon the present cost and cash value of its plant and water system, it is not, and will not, be necessary to charge a rate per annum of not less than \$7 for irrigation purposes or any sum in excess of \$3.50 per acre, per annum for irrigation purposes in connection with the rate for water for domestic use under said system actually established and collected.

That no petition has ever been presented to the Board of Supervisors of the county in which said system is situated for the fixing of water rates thereunder.

That said Land & Town Company and the complainant, Receiver, gave notice that on January 1, 1896, they would undertake to establish a rental of \$7 per acre, per annum, for water supplied to the respective lands of defendants.

That at the date of said notice the defendants were and for a long time prior thereto had been in the continued enjoyment of their said water rights and ease-

ments to the flow of the water thereunder, and were paying and always had paid to said company \$3.50 per acre, per annum, for each acre irrigated by each of them.

That each of the defendants refused to pay said rate of \$7 per acre, per annum; the admission that the defendants do maintain that neither the said Land & Town Company, nor said Receiver, has any legal or equitable right to fix the amount to be paid by any of them for such water for irrigation, and that the rate of \$3.50 per acre, per annum, actually established by said Land & Town Company by the contracts, conveyances, use, and practice as set forth in the answer, and which rate has at all times since the inauguration of said water system been collected and paid for the use of said water, must be and remain and of right ought to be and remain the established rate to be paid by these defendants for such use as against the said attempt of said company and the complainant to raise the same to \$7 per acre, per annum.

That Article XIV of the Constitution of the State of California and of the Legislative Act of the said State of March 12, 1885, included the provision that until water rates should be established by the Board of Supervisors, or after they should have been abrogated by such board, as in the said Act provided, the actual rates established and collected by each \* \* \* corporation then furnishing, or that should thereafter appropriate waters for sale, rental, or distribution to

the inhabitants of any county of said State, should be deemed and accepted as the legally established rates thereof.

The admission that in order to enforce the payment of said proposed rental of \$7 per acre, per annum, the complainant caused the water to be shut off from the premises of each of the defendants until such demanded rental should be paid.

The admission that the proposed increase of rates, if collected from all lands irrigated under said system, including those of said corporation, would increase the rentals collected by the company to not less than \$14,000 per annum.

The admission that the complainant Lanning was appointed Receiver, as alleged in the bill of complaint.

That all said matters and other matters in said answer not excepted to, taken together with the allegations of the bill of complaint, raised material issues in said cause.

And appellants say that by said erroneous reaffirmance of said order for taking said bill of complaint *pro confesso* each of the defendants was deprived of a hearing upon the merits of said unexpunged portions of the answer and the issues made thereby.

Fourteenth. Because the court by its ruling upon said demurrer and by its decrees herein overruled, the 10th assignment of error set forth in the bill of review.

Whereby the court erroneously reaffirmed its decision that the allegations of the original bill of complaint warranted the decree entered *pro confesso* in favor of complainant.

Fifteenth. Because the court by its ruling upon said demurrer and by its decree herein overruled the 11th assignment of error set forth in the bill of review.

Whereby the court erroneously ruled and held herein that its decree in said original cause was not, upon the allegations of the bill of complaint therein, against the statute law of the State of California entitled "An Act to regulate and control the sale, rental, and distribution of appropriated water," etc., approved March 12, 1885, and as amended by the Act of the Legislature of said State approved March 2, 1897, in this, to-wit:

That it appears on the face of said bill that the San Diego Land & Town Company of Kansas at the time when it commenced to furnish water to consumers, to-wit, in the year 1887, established the annual rate of \$3.50 per acre for irrigation, and that said corporation and C. D. Lanning, as its Receiver, from said date continually maintained and collected said rate and no more from all consumers and at no time collected any other rate, and that said rate at the time of filing said bill was and at the date of said decree remained the only actual rate established and collected by said corporation or its said Receiver, and that it further appears by the said bill that the Board of Supervisors of

the County of San Diego, mentioned in the complaint, had not fixed or established rates of yearly rental at which said San Diego Land & Town Company should furnish water to consumers.

And that by the said statute law it was and is provided that until such rates should be so established by such Board of Supervisors the actual rates established and collected by every such corporation should be deemed and accepted as the legally established rate thereof, and that said statute law further provided and provides that every such corporation furnishing water to lands, as did said Kansas corporation to the defendants (the appellants), as alleged in said bill, shall furnish such waters at rates not exceeding the established rates as fixed and established by such corporation as provided in said Act, and that said statute provided and provides that every such company shall be obliged to furnish such water at the established rates regulated and fixed therefor as in said Act provided to the extent of the actual supply of the waters of such corporation.

And that by said decree the appellants, defendants in said action, are deprived of the use of water from said system for irrigation at the rate actually established and collected by the San Diego Land & Town Company of Kansas at the time when said defendants respectively became owners of their water rights and at the only rates at any time actually established and collected by said corporation or its said receiver prior

to and since said vesting of the said water rights, to-wit, at the rate of \$3.50 per acre, per annum.

Sixteen. Because the court by its ruling upon said demurrer and by its decree herein overruled the twelfth assignment of error set forth in the bill of review.

Whereby the court erroneously holds that the decree in said original cause, upon the allegations of the bill therein, is not against the right of these appellants, named as defendants to said bill, in that said bill of complaint shows upon its face that your orators are the owners respectively of tracts of land under the water system of said San Diego Land & Town Company of

Kansas, and that your orators own and hold small tracts of land of only a few acres each, and said bill further shows that each of your orators respectively had become and was the owner of a water right to such part of the water appropriated and stored by said company as is necessary to irrigate his tract of land, subject to such yearly rental as said company was entitled to charge.

And that it further appears on the face of said bill that the annual expense of operating and keeping in repair the reservoir and water system of said company and of furnishing all consumers under said system is, exclusive of interest on the bonds of said company, the sum of \$12,034.99.

And that it further appears from said bill that the annual income from water rates collected under said system was \$25,715.00, and in that it further appears from said bill that the rate actually established and collected by said company for furnishing water for irrigation of the lands of your orators and *his* codefendants named in said bill under their said water rights was \$3.50 per acre, per annum, and that the proceeds of the same enters into the aggregate annual income of said water system.

And in that notwithstanding the said bill further shows that said company and the said C. D. Lanning, the Receiver of said company, the complainant therein, gave notice to your orators, defendants to said bill, that from and after January 1, 1896, they would demand a rental of \$7.00 per acre, per annum, for water for irrigation, being twice the rate up to that time actually established and collected by said company or its Receiver for furnishing your orators with such water and notwithstanding that said bill further shows that because your orators and each of them refused to pay said rate of \$7.00 per acre, and maintained that neither said Land & Town Company nor said C. D. Lanning, as Receiver thereof, had any legal right to increase the amount of rental to be paid by them or any of them, and maintained that the rate of \$3.50 established and collected by the said Land & Town Company must be and remain the established rate of rental, the said Receiver, in order to enforce the payment of said increased rentals, caused the said wa-

ter to be shut off from the premises of the defendants and each of them, and did deprive the appellants, defendants in said action, of the use and enjoyment of their said water rights upon payment of the rates of \$3.50 per acre, per annum, actually established and collected by said corporation and collected by said receiver.

Yet said rulings and decree upon the bill of review herein hold that said original decree does not erroneously hold, decide, and decree that said San Diego Land & Town Company of Kansas and Charles D. Lanning, Receiver thereof, had the right to increase the amount of the water rentals of said company for water furnished to the lands of said defendants from \$3.50 per acre, per annum, to the sum of \$7.00 per acre, per annum, without the consent of any of your appellants, and does not erroneously hold, decide, and decree that your appellants should be required to pay to the San Diego Land & Town Company of Maine said rate of \$7.00 per acre, per annum, for water furnished to their lands, as set forth in the said bill of complaint, from and after the first day of January, 1896, until the fixing and establishing of such rates by the Board of Supervisors of San Diego County, California, or the re-establishment thereof in accordance with law as a condition upon which water should be furnished them from said water system, and does not erroneously hold, decide, and decree that the San Diego Land & Town Company of Maine is authorized to shut off the supply of water for irrigation of such

lands of any of your appellants, the defendants to said bill, who should fail for five days to make such payment of arrears of said increase of water rate.

Whereby your appellants, the said defendants, are deprived of all benefit of the ownership of their wa-rights, and, notwithstanding said ownership, are required as a condition to the enjoyment of their said easements to pay to said San Diego Land & Town Company of Maine an annual rate to yield, as appears by said bill, and excess over and above the actual cost of repairs, operation, and management of said water system as and for interest and net revenue upon the whole cost and value of said system and without regard to the servitudes thereon owned by your appellants.

Seventeen. Because the court by its ruling upon said demurrer and by its decree herein overruled the thirteenth assignment of error set forth in the bill of review herein.

Whereby the court erroneously reaffirmed its decree in said original cause and holds that said decree on its face and on the face of said original bill does not enforce legislation of the State of California, so construed as that it is in violation of Section one (1) of Article XIV of the amendments of the Constitution of the United States, in that the legislation, so construed and enforced, maintains the San Diego Land & Town Company of Kansas and C. D. Lanning, its Receiver, in increasing the water rentals for water fur-

nished to the lands of your appellants for irrigation of their respective lands from \$3.50 per acre, per annum, to \$7.00 per acre, per annum, for such irrigation without the consent of your appellants, and in that said legislation, so construed and enforced, justifies and maintains the said Kansas corporation and the said Receiver and the San Diego Land & Town Company of Maine in having shut off the flow and use of the water under the water rights owned by the defendants to said bill from the lands of such defendants( the appellants), as shown in said bill, for refusal to pay such increase of rate, and in that said legislation, as so construed and enforced, requires said defendants to pay the San Diego Land & Town Company of Maine the rate of \$7.00 per acre, per annum, for water furnished their lands, as set forth in said bill of complaint, from and after January 1, 1896, as the condition upon which water shall be furnished them from said water system, and in that the legislation, so construed and applied, authorizes said last-named corporation to shut off the supply of water to any defendant who shall for five days fail to pay such increase of rate; by which means each of your orators is deprived of his, her, and its property without due process of the law, and each is likewise deprived of the equal protection of the laws, and each is likewise without due process of law deprived of his, her, and its liberty to purchase or otherwise acquire the water rights in the complaint referred to and is deprived of his, her, and its liberty to have the benefit of any acquisition, as in the complaint set forth, of such water rights.

And whereby it was erroneously held that said decree is not, for the reasons—in contravention of Article V of the amendments to the Constitution of the United States, as being an exercise of the judicial power of the United States, whereby your appellants are deprived of their property without due process of law, and whereby they are deprived, without due process of law, of their liberty to contract and acquire property.

Eighteen. Because the court, by its ruling upon said demurrer and by its decree herein overruled the fourteenth assignment of error set forth in the bill of review herein.

Whereby the court erroneously held herein that it was not error apparent in said original decree, in that it was entered *pro confesso* and without proofs upon the allegations of the bill and without regard to the expunged portions of the answer and without regard to the portions of the answer expunged on said exceptions filed September 22, 1897, and because it ruled, in conformity to the opinion filed in said action Sept. 14, 1896, adopted by and referred to in said decree, that, notwithstanding the alleged fact that \$3.50 per acre, per annum was the only rate for water supplied for irrigation that had been established and collected by said San Diego Land & Town Company of Kansas or said Charles D. Lanning, Receiver, that said San Diego Land & Town Company and Charles D. Lanning, Receiver, had the right to increase the

amount of the water rentals of said company for water furnished to the lands of defendants (your appellants) from \$3.50 per acre per annum to the sum of \$7.00 per acre, per annum, for such irrigation, and that the contracts with respect to the rates of \$3.50 per acre, per annum, set forth in the answer were void as being in conflict with the Constitution and laws of the State of California; and because it ruled that your orators had no right to be heard before the court on the questions of this reasonableness of the rates of \$7.00 per acre, per annum, which the complainant in said action sought to enforce and which said decrees enforces, and because it ruled that the defendants to said bill of complaint (your appellants) were not entitled, upon the question of the rightfulness and lawfulness of the increase of the rate of \$3.50 per acre, per annum, to \$7.00 per acre, per annum, to have any benefit of the ownership of their respective water rights as set forth in the bill of complaint or of their freehold easements and servitudes upon said company's water system as set forth in their answer, nor of the alleged fact that each had paid or made satisfaction to said San Diego Land & Town Company of Kansas for the price demanded by it for his, her, and its such water right, easement, and servitude.

That in point of law, among other things, said errors, are, to-wit:

1st. Said decree in said respects erroneously con-

strues and applies the provisions of the constitution and laws of the State of California referred to in the bill of complaint and answer.

2nd. That said provisions of the constitution and laws as so constructed and applied by said decree are in contravention and repugnant to Article XIV, Section I, of the amendments to the Constitution of the United States, as depriving your appellants of their property without due process of law, and as depriving them of their liberty of contract without due process of law.

3rd. That in applying the said provisions of the State Constitution and statutes, as so construed by said decree and the opinion referred to therein, the judicial power of the United States was exercised in contravention of Article V of the amendments to the Constitution of the United States and deprived the defendants in said action (your appellants) of their property without due process of law and of their liberty of contract without due process of law.

4th. And that the provisions of Article XIV of the Constitution of the State of California, as so construed, applied, and enforced by said decree, are in violation of the guarantee by Section IV of Article IV of the Constitution of the United States of a republican form of government to said State of California, in that by said provision of the Constitution of said State as so construed, applied, and enforced the said State assumes the absolute control of all water appro-

priated and devoted to sale, rental, and distribution and the absolute control of all works devoted to the rights, easements, or servitudes in such water supply and water works; abolishes all supplying or distribution of such waters; abolishes all capacity for the acquisition of private property right to unite the ownership of any water supply from any such system with the ownership of lands for irrigation thereof by contract of purchase and payemnt or otherwise; abolishes all right or capacity for the acquisition of any water right, easement, or servitude in or upon any such water system by purchase or otherwise free from the perpetual obligation to pay net revenue, as the said statute now stands, or not less than six nor more than eighteen per cent per annum upon the cost or value of such water system, and abolishes all right or capacity to ascertain, fix, and define by contract or convention the rate or compensation to be paid by any consumer for the supplying of any such waters for irrigation of land.

Nineteen. Because the court by its ruling upon said demurrer and by its decree herein overruled the fifteenth assignment of error set forth in the bill of review herein.

Whereby the court erroneously held herein that there was no error apparent in said original decree, in that said decree is made in favor of the San Diego Land & Town Company of Maine, although said corporation has not become a party to the record in said

cause by supplemental bill or otherwise, and what interest, if any, said corporation hath or had in said action does not appear upon the record, nor was any claim on its part to any interest, so set forth that the defendants to said bill of complaint, your orators, could in anywise make answer thereunto or plead thereunto.

Twenty. Because the court by its ruling upon said demurrer and decree herein overruled the sixteenth assignment of error in the bill of review herein.

Whereby the court erroneously held herein that there is no error apparent in said original decree, in that this court was without jurisdiction to entertain said cause or to make any decree upon the merits therein.

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## ARGUMENT.

### I.

**Appellate Jurisdiction of this Cause is given to the Court by Sub-divisions 4 and 6 of Sec. 5 of the Judiciary Act of March 3, 1891, and extends to every question.**

Appeals may be taken from the Circuit Courts direct to the Supreme Court in the following cases *inter alia* (Act of March 3, 1891, Sec. 5).

(4) "In any case that involves the construction or application of the Constitution of the United States."

(6) "In any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

The bill of review embraces the record history of the cause; and the court will look into it to ascertain whether application of the Constitution of the United States has been invoked in good faith in the several stages of the litigation, in vindication of alleged rights. *Carey v. Houston & Texas Central Railway* 150 U. S. 170, 181.

"The validity of a statute is drawn in question whenever the power to enact it, as it is by its terms, "or is made by construction, is fairly open to denial and "is denied." *Miller v. Cornwall Railroad Compay* 168 U. S. 131, 133; *Baltimore & Potomac Railroad v. Hopkins* 130 U. S. 210, 224.

In the case as presented by the bill of review, inquiry is fairly raised, and not as a moot question, within the rule stated in *Castello v. McConnico* 168 U. S. 674, 680, whether the application, as enforced by the court in the original cause, and in disposing of the bill of review, of the constitution and statutes of the state as construed by it, deprived the appellants of their liberty and their property without due process of law, and deprived them of the equal protection of the law.

Without anticipating the discussion of the merits of the constitutional questions in the later portions of this brief and particularly in sub-division VII thereof,

it is sufficient here to state that the Fifth and Fourteenth amendments were invoked against the depriving the appellants of their liberty to enter into contracts and against the depriving them of their vested property rights without due process of law and against the denial to them of the equal protection of the law in every stage of the proceedings after the filing of the original bill; in the answer to it (Trans. folios 52-53-54-55-56); in the issues of law arising on the exceptions to the answer (folios 86-87-88-89-90); also in the bill of review (folios 108, 111, 117, 118, 119, 120.)

The case proceeds upon such bill of review as on an original bill. 2 Hoff. Ch. Pr. 12.

The constitutional questions were preserved in the assignments of error on appeal. (folios 162, 165, 175, 176, 177, 178).

The case is therefore fully within the provisions of the judiciary act above quoted in respect of the appellate jurisdiction.

*Chicago, Burlington & Quincy R. R. Co. v. Chicago* 166 U. S. 226, 233-4; *Ballingham Bay v. New Whatcomb* 172 U. S. 314, 317; *Penn Mutual Life Ins. Co. v. Austin* 168 U. S. 685, 694.

The jurisdiction remains even though the court should not find it necessary to pass upon the constitutional questions under the sub-div. 6 of Sec. 5 of the Judiciary Act of 1891, as for example, in case it should hold that the construction by the learned Circuit

Court of the State Constitution and laws to be incorrect. *Holder v. Aultman* 169 U. S. 81, 88-9. But the original answer also invoked the Fifth Amendment against the claim and acts of the Receiver. And the bill of review invoked the same amendment against the rulings and decree in the original cause.

And since the Circuit Court was thus requested to construe and apply the Constitution to the acts of the Receiver, and to the rulings and decree in the original cause, this court has also jurisdiction under the subdivisions of Sec. 5, even though the lower court had declined or omitted to construe or apply it. *Cornell v. Green* 163 U. S. 75, 78. But the record shows that the constitutional questions were necessarily passed upon.

This court has thus acquired jurisdiction of the entire case and of every question involved in it, and not merely of the constitutional questions. *Horner v. United States* 143 U. S. 570, 576-7; *Carey v. Houston & Texas Central Ry.* 150 U. S. 170, 181; *Chappell v. United States* 160 U. S. 499, 509; *Press Publishing Co. v. Munroe* 164 U. S. 105, 110, 111; *Scott v. Duval* 165 U. S. 58, 71-4; *Holder v. Aultman* 169 U. S. 81, 88, 89.

## II.

**The Bill of Review for Error Apparent, on the Record was the appropriate method for presenting the questions of errors assigned as committed in the procedure and upon the merits, in the original cause; and such questions are substantial.**

The fourth ground of the demurrer to the bill of re-

view is that the remedy of the appellants is by appeal and not by bill of review; this was erroneously sustained by the court.

The bill is in full conformity to the practice in the high court of chancery in England within the meaning of the Equity Rule 90.

"If the bill is filed on the ground of error, the decree complained of must be contrary to some statutory enactment, or some principle or rule of law or equity, recognized and acknowledged, or settled by decision, or be at variance with the forms and practice of the court." 2 Daniell Chanc. Pr. 5th Edn. 1577. Cited by Fuller, Circuit Justice, in *Hoffman v. Knox* 50 Fed. 484, 490.

That the filing of bills of review in such cases is received practice, is abundantly evidenced by the reported cases in this court, among which are: *Whiting v. Bank* 13 Pet. 6; *Putnam v. Day* 22 Wall 60, 66-7; *Buffington v. Harvey* 95 U. S. 99, 100; *Ensminger v. Powers* 108 U. S. 292, 302-3.

In *Willamette Iron Bridge Co. v. Hatch* 125 U. S. 1-7, where, as here, the bill of review was demurred to, the demurrer sustained; and where the court below affirmed the decree in the original suit and dismissed the bill of review, the court said:

"On a pure bill of review, like one in this case, nothing will avail for a reversal of the decree but errors of 'law apparent on the record' " (Citing cases). "Does 'any such error appear in the present case? The court below has decided in the negative. We are called upon to determine whether that decision is correct."

For the purpose of the hearing had upon what are properly to be considered exceptions to the answer, the facts alleged in the original bill and admitted by the answer, and the denials and new matter set forth in the answer, must be considered as admitted, and only matter of law is presented for decision, as in a case set down for hearing on bill and answer, with the exception that on such submission, the case is not immediately ripe for final decree. *Sanford Tool Co. v. Howe, Brown & Co.* 157 U. S. 312-316. *In re Sanford Fork & Tool Co.* 160 U. S. 247, 257.

In *McDougall v. Dougherty* 39 Ala. 409 it was said:

"On the question of error apparent that will justify a bill of review, it is permissible to consult all the facts which are apparent in the pleadings, in the process, and its service, in orders, reports confirmed and opinions and decrees of the chancellor".

And in *Clark v. Killian* 103 U. S. 766, 769, it was held that taking all the circumstances to be as they were set out in the pleadings, the court had erred in point of law and "consequently a bill of review was the proper mode of remedying the error."

In *Thompson v. Wooster* 114 U. S. 107, 111, 112, it was said of a decree upon a bill taken *pro confesso*: "It cannot be impeached collaterally, but only upon a bill of review, or (a bill) to set it aside for fraud. I" "Daniell Ch. Pr. 696 1st Ed.; Ogilvie v. Herne 13 Ves. 563."

*Maynard v. Parcault* 30 Mich. 160, 161.

It was also said (*Ibid.* p. 114) that after entry of the decree *pro confesso*, and while it stood unrevoked, the defendants were, "barred and precluded from questioning its correctness here *on appeal, unless on the face of the bill it appears manifest that it was erroneously and improperly granted.*"

Text books and decided cases hold the language, in substance, that if matter is erroneously stricken out of the answer on exceptions for impertinence, *the error is irremediable*. Story Eq. Pl. Sec. 267 and note, citing *Davis v. Cripps*, 2 Younge & C. (N. R.) 443; *Attorney General v. Ricards* 6 Beav. 444; *Tucker v. Cheshire R. R. Co.* 21 N. H. 38; *Woods v. Morrell* 1 John Ch. 106. See also *Daniells Ch. Pl. & Pr.* Perkins 4 Ed. 759. Note 6. *Chapman v. School District* 5 Fed. Cases p. 483-4; *United States v. McLaughlin* 24 Fed. Rep. 823, 826. In the case last cited Judge Deady said:

"If I should be of the opinion that these portions of 'the answer are impertinent and strike them out, the Supreme Court (on appeal) would have no basis upon which to fully determine the question and render a proper decree; and it might become necessary to affirm an erroneous decision, because a part of the defendants' case is not in the record."

The foregoing authorities leave it doubtful whether correct practice upon appeal from a final decree *pro confesso*, would permit review of errors committed in sustaining exceptions to the answer, and in expunging the whole or any portions thereof from the record; although it is possible that such questions have been entertained upon appeals in cases where the decree

was not in form *pro confesso*. *Harrison v. Perea* 168 U. S. 311, 318; *In re Sanford Fork & Tool Co.* 160 U. S. 247, 248, 258.

But whatever may be the practice in case of appeal from the original decree, entered in form *pro confesso*, as to whether errors in ruling upon exceptions to the answer will be reviewed, it is not to be questioned that according to the course of equity, resort may be had to the pure bill of review to remedy such errors. See in addition to the cases above cited, *Gallatin Coal, Land & Oil Co. v. Davis.* (W. Va. 1897) 28 S. E. Rep. 747, 748, S. C. 44 W. Va. 109.

A bill of review will lie if the decree is not warranted by the allegations of the bill. *Thompson v. Wooster supra*; *Goodhue v. Chamberlain* 1 Barb. Ch. R. 596; *Griggs v. Gear* 3 *Gilman* (Ills) 2, 14; *Prentiss v. Paisley* 7 So. R. 56, 57. S. C. 25 Fla. 927; *Shilling v. Hart* 20 Fla. 235; *Hart v. Shilling* 21 Fla. 136; *Maynard v. Pereault supra*, 30 Mich. 160, 161.

The expunged portions of the answer presented questions of the existence, nature and extent of alleged statutory and contract rights of property set up against the claim of the plaintiff to raise the annual water rate: they also invoked provisions of the Constitutions of the State and of the United States in protection of such rights. Some of these questions the court below treated as of sufficient pertinence to bestow upon them elaborate consideration. It cannot be that allegations of this character are impertinent or

that they raise immaterial questions. It is submitted that the bill of review was the appropriate method of presenting these questions, and that the questions themselves are not frivolous, but grave and substantial in character.

### III.

## Irrigation Easements an Institution of Private Property.

**In the arid region of the United States, rights to the flow and use of water from the property of one owner for the irrigation of lands of others are an institution of private property, born of necessity, developed by custom, and confirmed by law; and such rights are estates in land.**

The leading questions in this case, and the provisions of the State Constitution and laws involved, cannot be dealt with intelligently, without taking into primary consideration water rights for irrigation, considered as an institution of private property. The origin and growth of this class of property in the Pacific and Rocky Mountains States and Territories, is a subject of ~~s~~ fascinating interest; it invites the student of law to an intimate view of the process by which there has grown up an indigenous class of property rights, taking its origin in over-mastering needs, fostered by the instinctive traits of the Anglo Saxon race, which make for social order and individual rights (98 U. S. 457), and finally recognized by all the courts, and confirmed by legislation. In the exercise and unfolding of these rights, the student of economics surveys with wonder

and admiration the transformation of a land quaintly and graphically described by a Mormon historian "as "a desolation of centuries, where the earth seemed "heaven forsaken, where hermit nature watching, "waiting, weeped and worshipped God amid eternal "solitude."<sup>1</sup>

All this change has been wrought since July 24, 1847, when it is said the first attempt was made "by the Anglo Saxon race to reclaim arid lands."<sup>2</sup>

The course of this development upon public lands of the United States, which comprised virtually the whole of the water yielding land in that region, as reflected in the decisions of this court, is marked by the cases of *Atchison v. Peterson* 20 Wall. 507, *Basey v. Gallagher* *ibid* 670; *Jennison v. Kirk* 98 U. S. 453, *Broder v. Water Co.* 101 U. S. 274; and the suggestive state of facts with which the court dealt in the recent case of *United States v. Rio Grande Irrigation Co.* 174 U. S. 690.

The case last referred to, reviews the congressional history of these property rights, and cites the Act of 1886 (14 Stat. 253; Rev. Stat. 2339); the Act of 1877 (19 Stat. 377); and that of March 3, 1891 (26 Stat. 1101); and concerning them says, (p. 706):

"Obviously, by these acts, so far as they extended, "Congress recognized and assented to the appropriation of water in contravention of the common-law "rule as to continuous flow".

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(1) *Irrigation in Utah*, John Hopkins University-Studies (1899) C. H. Brough, p. 6.

(2) *Ibid*, p. 1.

And in the same case it was said at page 704:

"Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of 'the stream as it was, and although there had been in all the Western States an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain states, the reclamation of arid lands in others, compelled a departure from the common-law rule, and justified an appropriation of flowing water both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those states, by custom and by state legislation, a different rule—a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes."

The following is from the Act of 1866, Rev. St. Sec. 2339:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed."

Speaking of this statute, the court said in the case last cited, p. 704.

"The effect of this statute was to recognize, so far as the United States is concerned, the validity of the local customs, laws, and decisions of courts in respect to the appropriation of water. In respect to this, in *Broder v. Water Co.* 101 U. S. 274, 276 it was said:

"It is the established doctrine of this court that  
 "rights of miners, who had taken possession of mines  
 "and worked and developed them, and the rights of  
 "persons who had constructed canals and ditches to be  
 "used in mining operations and for the purpose of ag-  
 "ricultural irrigation, in the region where such ar-  
 "tificial use of the water was an absolute necessity,  
 "are rights which the government had, by its con-  
 "duct, recognized and encouraged and was bound  
 "to protect before the passage of the Act of 1886."  
 "We are of the opinion that the section of this Act  
 "which we have quoted was rather a voluntary *recog-*  
*"nition of a pre-existing right of possession*, constituting  
 "a valid claim to its continued use, than the establish-  
 "ment of a new one."

See also Act of July 9, 1870, Rev. Stat. Sec. 2340, and the following of the earlier cases:

*Irwin v. Phillips* 5 Cal. 140.

*Schilling v. Reminger* 4 Colo. 100, 104.

*Coffin v. Left Hand Ditch Co.* 6 Colo. 443, 446-7.

*Labdell v. Simpson* 2 Nev. 274, 277.

For a very full citation of cases in several states, see  
*Union Mill & Mining Co. v. Douglass* 81 Fed. R. 73,  
 95-6.

The following is from the opinion in the case, in 6  
*Colo. supra*, at page 446.

"The climate is dry, and the soil, when nourished  
 "only by the usual rain fall, is arid and unproductive;  
 "except in a few favored sections, artificial irrigation is  
 "an absolute necessity. Water in the various streams  
 "thus acquires a value unknown in moister climates.

"Instead of being a mere incident to the soil, it rises, "when appropriated, to the dignity of a *distinct usu-fructuary estate, or right of property.* It has always "been the policy of the national, as well as the territorial and state governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. Houses have been built, and permanent improvements made; the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right of priority of appropriation, and a great part of the value of all this is at once destroyed."

The foregoing references sufficiently show that water rights on the public domain of the United States, grew into an institution of property by successive stages of progression in the following order; possession, custom, judicial decisions, statutes operating as grants.

They were initiated by possession taken by individuals and consolidated by the customs of communities; afterward they were sustained by the courts and confirmed by legislation. They are the freshest flower of the Anglo-Saxon characteristic of individual, as distinguished from state-led enterprise.

What is thus true of water rights acquired on the public land of the United States, is similarly true of the acquisition of like rights upon public lands of this

state. *Lux v. Haggin* 69 Cal. 255, 374-6, 446-7; *Osgood v. Water Mining Co.* 56 Cal. 572, 580. *Wood v. Eticwanda Water Co.* 122 Cal. 152, 158-9. Civil Code Secs. 1410, 1421, copied in appendix hereto.

An institution of property, sufficiently virile, thus to force itself upon the public domain, in contravention of the common-law doctrine of riparian rights, and to secure recognition in the jurisprudence and legislation of the states and United States, has for the same reasons flourished in connection with private ownership of land whether under Spanish or Mexican grants or grants from the United States or the State. The same law of necessity which gave rise to the institution, operates more widely, variously and imperatively as population and the occupation and use of the soil increase. The law reports of all the States and Territories of the arid region are thickly studded with cases, in ever increasing ratio, in which figure water rights in all the varieties of interest, and incident arising from private ownership under the free play of social activity.

#### B.

##### **Easements for Irrigation are interests in the real estate constituting the water system.**

The subject of Section 2339 Rev. Statutes is "rights to the use of water." In Sec. 2340 Rev. Stats. the term "water rights" is employed disjunctively, with the phrase "rights to ditches and reservoirs used in connection with such water rights". Title VIII of

the Civil Code of California copied in the appendix, which treats of the right to the use of running water, that may be acquired by appropriation, bears the title "*Water Rights.*" Article XIV of the State Constitution (see appendix) is headed "*Water and Water Rights*" and deals with water devoted to sale, rental or distribution.

The common characteristic of all these water rights for irrigation, is the use of water from land for the irrigation of other land. It is in this sense that the original bill in this case uses the phrase, when it alleged "*that each of said defendants has, by purchase or otherwise, become the owner of a water right, to a part of the water appropriated and stored by said company, necessary to irrigate his tract of land;*" (Trans. p. 9).

The reservoir, dam, and the land occupied by the water mains and pipes of the system and including them, together with the water rights appurtenant thereto, are doubtless corporeal property—real estate—the title to which was in the corporation.

*Reed v. Spicer* 27 Cal. 58, 63.

*Fudickar v. East Riverside Irr. Dist.* 109 Cal. 29, 36-8.

Are the "water rights" in this system of which the bill alleges that the appellants are the owners, and which the answer more fully describes, incorporeal interests in this corporeal property of the company, annexed to the lands of appellants? This is not a

merely academic speculation, but a question of practical and vital importance in the cause.

One solution given to it, may lead to the conclusion, that it is possible in this State, through the medium of contracts with water corporations, to effect a substantial unity of title to land and water supply; that the tiller of the soil may by purchase, or acquisition otherwise, of water rights from the corporations, free himself either wholly or beyond a stipulated limit, from a perpetual obligation to render to them net revenue on valuations and re-valuations of the water systems; and, that at the same time the corporations may realize upon their investments, by sales of interests in such systems to the owners and irrigators of land.

Or, a different solution may lead to the opposite conclusion, that the titles to land and water are, and must remain, separated by an impassible gulf not to be bridged by contract or treaty; that irrigators of land, because forbidden to buy, must forever pay an interest guaranteed by the strong arm of the law, on the investments of the companies; and that the corporations, because they may not sell, are doomed to have their principals locked up in perpetuity, producing only annual rates, and perennial crops of law suits over them, because it is forbidden to settle such rates by contract.

As we understand the judgment of the learned court below, these latter alternatives are those which its opinion and decision tend to advance.

We venture to believe that a correct conception of the nature of the interests designated "water rights", such as are disclosed upon the face of the pleadings in this cause, furnishes a solid basis for the construction and application of the provisions of the State Constitution and statutes, relating to the subject, and for testing from all points of view, the validity of the theory upon which the case was disposed of at the circuit.

A conflict of opinion arose between the Court of Appeals and the Supreme Court of Colorado upon the question whether such water rights constituted a property interest in the water system. It was not denied by either court that such rights might be created by contract, and those involved in the conflict, were so created. The Court of Appeals in the case of *Wyatt v. Laramie & Weld Irrigation Co.* 29 Pac. R. 906, 913, used the following language:

"By the purchase of rights the purchaser acquired 'no property interest in the canal, or to any water appropriated by the canal company, except the amount agreed to be delivered.'"

But the Supreme Court on appeal reversed the judgment of the Court of Appeals and in course of their unanimous opinion, reasoning from principles and citing authorities of the common law, say, (33 Pac. R. 144, 147):

"The plaintiffs allege a right to have a certain quantity of water flow through the irrigation company's 'ditch. This right is an easement in the ditch. It is

"a right annexed to the realty, and, being a perpetual "right, is an incorporeal hereditament, descendible by inheritance to plaintiffs' heirs, and hence a *freehold estate*."

This conclusion was adhered to upon a re-hearing.  
*Ibid* p. 150.

In the case of *Empire Land & Canal Co. v. Board of Comm's* 40 Pac. R. 449, 451, on error to the Court of Appeals, it was said by the Supreme Court of the same State.

"But in view of the variance between the courts on this question, as shown in *Wyatt v. Irrigation Co.* 18 "Colo. 298, 33 Pac. 144, which was decided long after "the judgment in the present suit, some reference "ought to be made to one paragraph of the opinion "rendered by the other court. It is said therein, 'the "right to demand water from the ditch, and have a "given quantity per second delivered from the ditch "to the consumer, carries with it no property inter- "est in the ditch itself. It is, at most, but a contract "sounding in damages in case of non-performance on "the part of the corporation.' . . . . As a declara- "tion of law as to the nature of this class of water rights, "we would be compelled, in a proper case to hold it erron- "eous, and at variance with the rule that was settled in "the *Wyatt* case *supra*."

*Chicosa Irri. Ditch Co. v. El Moro Ditch Co.* (Court Appeals Colo. 1897) 50 Pac. Rep. 731, 733.

The decisions of the Colorado Supreme Court are of special significance in view of the fact that by the Constitution of that State, the unappropriated water of every natural stream is declared to be the property of the public, subject, however, to appropriation. (Appendix.)

*In Nellis v. Munson* 108 N. Y. 453, 460, 15 N. E. 739 741, the court, after stating that the main question was whether the right to bring water across the lands of one for the benefit of another constitutes an interest "in fee and a freehold estate" said:

"It seems to follow, necessarily from the authorities, that an easement to draw water through pipes "over the land of another for the benefit of a dominant "tenement, is an interest in lands existing independent of "the fee of the land over which it is exercised, and is an "estate in land possessed in fee by the owner of the dom- "inant estate. It is an incorporeal hereditament con- "sisting of an estate of inheritance, transferable ac- "cording to the statute of descents, and comes direct- "ly within the terms "fee and freehold estate" as used "in section 137."

*In Pinkum v. City of Eau Claire* 81 Wis. 301, 51 N. W. 550, a case of a canal easement, it was said, citing 2 Bl. Comm. C. 7, pp. 106, 107, among other authorities:

"The easement is also in perpetuity. That an easement may be created in fee is well settled. The fee of land may be in one person, and the fee of an easement upon such land in another."

So in *Branson v. Studebaker* 133 Ind. 147, 33 N. E. 90, 103-4, it was said:

"All easements are estates in land. A fee may ex- "ist in all estates in land; therefore a fee may exist in "an easement."

10 Am. & Eng. Enc. of Law, 2nd Ed. Easements p. 403 and note 1.

"All easements and profits *a prendre* may be held "for life, in fee or for years. Strong J. in *Huff v. McCauley* 53 P. St. 206. The interest of an easement "may be a freehold or a chattel one, according to the "duration. Wash. E. & S. p. 6. A perpetual easement is a freehold."

Turning now to the legislation of the State of California there is found, as would be expected in its Civil Code, that irrigation easements have their place in the statute law. We have printed in the appendix the provisions of the chapter headed "Servitudes", and quote here only the particular provisions defining the easement.

"Sec. 801. The following land burdens or servitudes on land may be attached to other land as incidents or appurtenances, and are then called easements..... 9. The right of receiving water "from or discharging the same upon land..... "11. The right of having water flow without diminution or disturbance of any kind."

"Sec. 806. The extent of a servitude is determined "by the terms of the grant, or the nature of the enjoyment by which it was acquired."

The chapter on servitudes from which the above provisions are quoted is perhaps entirely a codification of well settled principles of the common law. But the legislature evidently deeming more specific legislation needful to give security to water rights, for irrigation, on April 3, 1876, enacted what became a section of the Civil Code, which is as follows:

"Sec. 552. Whenever any corporation, organized "under the laws of this State, furnishes water to irri-

"gate lands which said corporation has sold, the right "to the flow and use of said water is and shall remain "a perpetual easement to the land so sold, at such "rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land on the line and within "the flow of any ditch owned by such corporation, "has been furnished water by it to irrigate his land, "such person shall be entitled to the continued use of "such water, upon the same terms as those who have "purchased their land of the corporation."

Inasmuch as neither the Kansas nor the Maine corporation were organized under the laws of this State, the following Section of Art. 12 of the Constitution is pertinent.

"Section 15. No corporation organized outside of "the limits of this State shall be allowed to transact "business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State."

In this connection also is the statute of March 2, 1897, made part of the Act of 1885, set forth in the appendix which forbids any construction of the Act to prohibit or invalidate any contract already made, or which shall hereafter be made by or with any corporation \* \* \* \* "relating to the sale, rental or distribution of water, or to the sale or rental of *easements and servitudes* of the right to the flow and use "of water; nor to prohibit or interfere with the vesting "of rights under any such contract."

The section 552 above quoted, though passed before the adoption in 1879 of the present State Constitution, is enforced by the decision of the Supreme Court as consistent with the "public use" declared by Article 14 of that instrument. *Merrill v. Southside*

*Irrigation Company* (1896) 112 Cal. 426, 434-5. This case is referred to and recognized in the opinion of the Circuit Court in the case here under review. 76 Fed. R. 319, 333-4.

It may not be out of place to advert to considerations which lead in the arid region to specific legislation like that of such Section 552, tending to give definiteness and certainty to individual water rights for irrigation, and to the features which distinguish the relations of the works of an irrigation corporation to the land irrigated, from the relation to land of other public service corporations, such as railways; or, of a city water system to houses for urban uses, or of gas, or electric lighting plants, to the premises of those served by them. Of course there is to be considered, the primary fact that agriculture lies at the basis of civilization and of all social progress, and that stability and certainty of tenure of soil and water are indispensable conditions to its prosperity. The great excess of labor required on a given acreage tilled by irrigation, over that required on a equal area tillable without irrigation, leads to intensive cultivation, great expenditure for fertilization of the soil, and consequently to small tracts in individual ownership. In the case at bar, such ownership consists generally of only a few acres, the average perhaps not exceeding ten; in Utah, where water is comparatively more abundant as compared with the irrigable land, the average size of the irrigated farms is 27 acres (*Irrigation in Utah, supra* p. 75) with a tendency to decrease in

size of the farm unit. (*Ibid* 81.) In California, the development of the citrus and fruit tree industries, implies costly groves and orchards, dependent for life upon irrigation. It is the general condition that the amount of irrigable land far exceeds the available water supply. Hence, unless the supply of water to the irrigated land is assured in sufficient quantity at the proper time, there follows great pecuniary loss and inevitable distress.

But it is the experience of those who have earlier improved their lands, that subsequent comers seek to share in the supply beyond the safe "duty" of the water systems. Hence some principle must be found to protect the prior users as prior in right. Upon this subject Elliott J. in *Reservoir Co. v. Southworth* 21 Pac. R. 1028, 1032 (Colo.) said:

"A single illustration will suffice to show the disastrous consequences which would come if the proportionating statute should be made the rule of distribution of water for purposes of irrigation instead of the rule of priority. An irrigating ditch is constructed, the first and only one, taking water from a small, natural stream. The first year five consumers apply for and receive each one hundred inches of water for irrigating of their land; the next year, the ditch being enlarged, five more apply and receive a like quantity; and the third year five more; and so on successively until thirty or forty consumers are located under the ditch. Perhaps the first five might be required to prorate with each other in time of scarcity, should their appropriations be practically equal in point of time; but under the statute, the first five would also be compelled to prorate with all subsequent consumers, until the amount of water that each would re-

"ceive would become so infinitesmally small as to be "of no practical value, and would eventually be entirely wasted before it could be supplied."

The Supreme Court of California in *Merrill v. Southside Irrigation Co.* *supra* (112 Cal. p. 435) in expounding the policy of Sec. 552 Civil Code, *supra*, said:

"The object of the statute is quite evident. Water "for irrigation is, in many pursuits essential to the "productiveness of land, and if, when it has once been "furnished the company so supplying it for such pur- "pose may at will refuse such supply, the owner of ir- "rigated land is at the mercy of the corporation who "may ruthlessly destroy the crops of the season, or in "case of orchards and vineyards the result of many "season's industry by refusing to continue the supply "of water."

Of course the very central legal principle in the acquisition of water rights by appropriation is that declared in the following section of the Civil Code.

"Sec. 1414. As between appropriators, the one "first in time is first in right."

In *Nichols v. McIntosh* 34 Pac. R. 278, 280, involving the application of the constitutional safeguard of "due process of law" to the priority of a right, the court made use of the following language:

"It often happens that the chief value of an appropria- "tion consists in the priority over other appropria- "tions from the same natural stream. Hence to de- "prive a person of his priority is to deprive him of a "most valuable property right. . . . . A priority of "right to the use of water being property, is protected

"by our Constitution so that no person can be deprived of it without 'due process of law'".

In speaking of rights of priority to use of water, it was said by Elliott J. in *Reservoir v. Southworth* (Colo.) *supra*, 21 Pac. Rep. 1028, 1030:

"Every consumer cannot take water from the natural stream. Irrigating ditches and canals must be resorted to as a means of diverting and conveying water to places where it can be beneficially applied. *No good reason can be urged why a consumer, obliged to use such an agency, should not be protected equally with those taking water directly from the stream.*"

Indeed, the learned Circuit Judge speaks of vested rights in perpetual easements for irrigation of lands and their protection, in terms with which we fully concur.

He says in his opinion (76 Fed. R. p. 334). "Of course no company can be compelled to furnish water beyond its capacity. Indeed, consumers themselves are vitally interested in seeing that the capacity of the distributor is not overtaxed; so much so that in Colorado, it is held, *and properly held*, that a consumer who settles upon and improves land by means of water appropriated and distributed under and by virtue of the Constitution and laws of that State, giving to the first in time the first in right, can maintain a suit against the distributor of such water to prevent the spreading of it beyond the capacity of the system, so as to endanger the supply of those whose rights have already vested, and upon the faith of which they have invested their money and made their improvements. *Wyatt v. Irrigation Co.* (Colo. Sup.) 33 Pac. 144. In California the same right is secured by statute as well as by judicial decisions. . . . And by the provision of Sec. 552 of the Civil Code of

"California, a consumer whose *rights have once vested* "is protected from the injury of having his supply cut "off, for it in terms declares him entitled to the con- "tinued use of the water upon payment of the rates "established by law. Necessarily growing out of this "right to the continued use of water which he has ac- "quired as a *perpetual easement to his land*, is the right "of such consumer to prevent, by injunction, if need "be, the distributor from disposing of or attempting to "furnish others beyond the capacity of the system, "thereby imperilling the rights of those already "vested."

One reason why no easements in favor of agricultural lands are recognized in railways, although their use is also public, is doubtless that there is no physical connection of railways with the lands of any of the individuals who in the aggregate constitute the public; another, that there is no such intimate and absolute dependency of the land upon the railway, or of the railway upon the land, or any such fixed interrelation as in the case of a water system, which can serve only a definite and assignable area and must serve specific tracts only. In the case of gas, electric light and power plants and city water systems for domestic supply, the analogy to irrigation systems is closer. They are connected with the premises served, by pipes and wires. In case of gas and electric light and domestic water supply each is generally adapted to being furnished continuously.

But analogies, however valuable as illustrations, must be cautiously used as foundations for conclusions. Neither public necessity nor popular practice has asserted perpetual easements in lighting or

water systems; some reasons why they are not asserted are, that the uses are in fact fluctuating in amount, interrupted in time, shifting as to users and liable to cease in any structure altogether, either because it is no longer used, or the need is otherwise supplied; again, should population crowd upon the supply, there are available make-shifts or even other constant sources of supply attainable.

But in case of irrigated land, from its permanent character and needs, it follows that *a definite maximum amount of water*—as for example, a miner's inch perpetual flow to so many acres, or, as in the case of certain contracts set forth in the answer in this case, an acre foot per annum to each acre—must be reserved for it, so long as the right is not lost by the act or default of the owner, against all subsequent comers; and the land owner must in some form pay for this *maximum amount* because *it is reserved for him*.

It is this defined and continuous right, which constitutes the servitude upon the water system and becomes the perpetual easement to the land; and as is apparent, it arises out of the necessity of the environment.

There can be no rational question but that easements of the flow and use of water for irrigation are recognized by the laws of this State, as of this whole region, as an institution of private property; and that, without discrimination, whether they originate in appropriation on public lands of the State or the United

States; or upon property in individual ownership, or in the ownership of corporations, whether mutual or quasi-public, through grants from either of them express or implied, or by prescription, or under the circumstances defined in Sec. 552 of the Civil Code.

When acquired by appropriation (under Sec. 1411, Civil Code), the period for losing the same by non-user, for any beneficial purpose, is five years, in analogy to the period fixed by law for the ripening of an adverse possession of land into a prescriptive title.

*Smith v. Hawkins* 110 Cal. 122, 126-8.

Same case 120 Cal. 86-7.

When acquired by grant or contract it cannot be lost by adverse user short of the period for the limitation of actions to recover real property.

*People v. Farmers' etc., C. & R. Co.* (Colo. 1898.) 54 Pac. R. 626, 630.

The period for acquiring the same by mere prescription, is also five years, according to Sec. 1007 of the Civil Code, quoted and the cases cited later on.

The period for extinguishing a servitude acquired by enjoyment or prescription, is also five years disuse under Section 811 of the Civil Code Sub. div. 4 (appendix.)

*Smith v. Hawkins* 110 Cal. 122, 126 *supra*.

All of which emphasizes the fact that such easements are interests in real estate.

Considering the easements of the defendants somewhat in detail with regard to the manner of their creation, we submit:

That the corporation so far as the water supply was brought upon its own lands became in fact and in its own intent, the owner of both land and water in one estate.

It built its dam and pipe system as set forth in the answer, and threaded its land with a net work of pipes filled with water under gravity pressure from the water stored at a higher altitude in its reservoir.

When it sold and conveyed parcels of its land to certain of the defendants, un'less the grants contained express exceptions of that portion of the corporeal estate which consisted of the water supp'y led upon the land, such supply passed with the land. Upon familiar principles, so much of the pipes as lay within the boundaries of the granted land, to the extent of their capacity necessary and adapted to supply that land, passed with the fee and in fee; and as to the reservoir and so much of the conduits as led up to and lay outside of the boundary of such land, upon the severance, there sprang up the relation of the servient estate to the land granted, as the dominant estate; in other words, the servitude upon the water system, so far as such system was not actually within the land granted, passed by the grant as an appurtenant easement; and as is well established by authority in this State, it

passed without express mention, and even without the use of the term "appurtenances" in the deed.

*Cave v. Crafts* 53 Cal. 135.

*Farmer v. Ukiah Water Co.* 56 Cal., 11.

*Fitzell v. Leaky* 72 Cal. 477.

*Standart v. Round Valley Water Co.* 77 Cal. 399.

*Coonradt v. Hill* 79 Cal. 587.

*McShane v. Carter* 80 Cal. 310.

*Crocker v. Benton* 93 Cal. 365.

*Clyne v. Benecia Water Co.* 100 Cal. 310, 314.

*Smith v. Corbit* 116 Cal. 587, 591.

The case last cited quotes and relies upon Sec. 3522 of the Civil Code, which is as follows:

"One who grants a thing is presumed to grant also "whatever is essential to its use."

See also Sec. 1104 Civil Code copied in appendix.

From other states we cite the following:

*Tucker v. Jones* (Mont.) 19 Pac. R. 571.

*Sweetland v. Olston* (Mont.) 27 Pac. R. 339.

*Cady v. Springville Waterworks Co.* 31 N. E. R. 245, 246.

*Simmonds v. Winters* (Or.) 27 Pac. R. 8, 10.

*Hindman v. Rizor* (Or.) 27 Pac. R. 13.

*Frank v. Hicks* 35 Pac. 475.

*Eliason v. Grove* 36 Atl. R. 845.

"No one can acquire an easement in his own estate. But in the absence of an express grant of such right from another, an easement in water may arise; first by prescription; second upon severance of tenement."

*Gould on Waters* (1 Ed.) Sec. 329.

*Washb. on Easements and Serv.* (3 Ed.) p. 25.

*Quinlan v. Noble* 75 Cal. 250, 252.

*Dixon v. Schermeier* 110 Cal. 582, 585-6.

"The interest in an easement may be a freehold or a chattel one, according to its duration." Wash. E. & S. p. 6.

Are the easements of the defendants freehold or chattel interests in the system?

Sec. 552 of the Civil Code declares them to be *perpetual*.

The Supreme Court of Illinois upon mature consideration of the case of the right to build and maintain a ditch across the land of another after declaring such right a perpetual easement in *Chaplin v. Commissioner of Highways* 126 Ill. 264, 273, 18 N. E. R. 765, 766,

767, and after an instructive review of authorities, said:

"A perpetual easement in lands, or any interest in lands in the nature of such easement, when created "by grant or any proceeding which is in law equivalent to a grant, constitutes a freehold."

Without aid from the statute (Sec. 552) there would be no difficulty in holding that the grants by the corporation of parcels of its land as irrigated land, where such land had been threaded with the pipes of the system built primarily to irrigate it, carried the freehold easement as appurtenant. So also under the express contracts for sale of land and water rights as one estate for a lump sum, in the form set out in the transcript, folio 30; and under the express contracts for sale of water rights making them appurtenant to other land for a sum in gross, in the form set out at folio 32, the easements passed in freehold.

And as respects those defendants who did not buy land of the corporation, and who did not take written contracts for the easement of "the flow and use of water"; but who prior to December, 1892, fell into and remain in that class of persons who "have been furnished water by it with which to irrigate their lands," under Sec. 552 of the Civil Code, we submit that the statute proceeding upon the voluntary act of the corporation, executes the conveyances to them of servitudes on the system at the established annual rate.

The intent of the statute is, to declare, in all cases where the corporation has voluntarily elected to furnish, and has begun to furnish water to lands not sold by it, at the same annual rates as to lands sold by it with the express or implied grant of water rights, and when upon the strength of this, the owner has improved and cultivated such land, that under such facts the law does not require the lapse of five years to create the servitude by prescription; but such servitude arises directly and the statute operates to make conveyance of the perpetual easement. It confers on the corporation the capacity to grant such easement, by doing the act prescribed, as fully as it could do by deed of grant.

In *Smith v. Green* 109 Cal. 228, 234-5 *supra*, it was said in the opinion:

"The general rule, no doubt, is that one who rests his claim to an easement in a verbal contract *alone*, "unexecuted and unaccompanied by any other facts, " has no rights thereto which he can enforce. But "there are many cases where a mere parol license "which has been executed, and where investment have "been made upon the faith of it, have been held irrevocable (Gould on Waters Secs. 323, 324, and cases "there cited); and, if the case at bar is to be determined "alone upon the law governing parol grants, the "rights of respondents, under the facts found, would "be established by that law."

But in addition to all this, the answer shows that the defendants in this class as in all the others, except those who took express grants since December, 1892, have for more than five years prior to January 1, 1896,

continuously held and enjoyed their easements paying to the company the annual rate of \$3.50 per acre, on the same footing with all the other defendants; and it relies upon the statute of limitation applicable to the case, to establish them in their freehold easements.

Sec. 1007 Civil Code is as follows:

"Occupancy for the period prescribed in the Code of Civil Procedure, as sufficient to bar an action for "the recovery of the property, confers a title thereto, "denominated a title by prescription, which is sufficient against all."

Sec. 318 of the Code of Civil Procedure fixes the period at five years. (Appendix) *Clyde v. Benecia Water Co.* 100 Cal. 310, 314.

*Faulkner v. Rondoni* 104 Cal. 140, 146.

*Joseph v. Ager* 108 Cal. 517, 520.

It was as open to the corporation to have prior to 1892 established a price to outside lands for the water rights which it voluntarily annexed to them, as it was after that time; or as it did from the beginning as to its own lands by enhancing the price at which it sold them on account of their being connected with the water supply to an average of \$325 or more per acre for it in the sage brush.

That it did not do so, whatever the cause, cannot affect the present owners, many of whom are subsequent purchasers at prices increased by the water rights then actually annexed (trans folio 40). Much

less can the fact that the company waived any price for the water rights to this limited amount of land, affect those who acquired their easements by purchase from the company.

The answer shows that the lands of all these defendants fall within a classification made by the corporation and its receiver (trans. p. 24) as those "to which 'the easement and flow of water for irrigation has been annexed by consent or the voluntary act of the company.'"

And finally and conclusively the bill itself alleges that each of the defendants has, by purchase or otherwise, become the *owner* of a water right, to a part of the water appropriated and stored by said company necessary to irrigate his tract of land (trans. p. 9), subject only to such yearly rental as the company is entitled to charge and collect.

"'Owner' in the general sense means one who has 'full proprietorship in and dominion over property.'"

*Directors F. I. District v. Abila* 106 Cal. 355, 362-3.

*Johnson v. Crookshank* 21 Or. 339.

All these considerations, we submit, establish that the easements of each of these defendants is in freehold and that the price of the same has been fully paid to the corporation, or acquittance of the price has been made to the long-time satisfaction of the corporation.

From this it results that there is neither justice, nor equity, nor anywhere the rightful power to compel the purchasers of their easements to pay for the same thing again by way of increase of the annual rate to yield net revenue on the value of the easements. As to these lands, the element of net revenue, except as it is included in the established annual acreage rate of \$3.50, is for all time eliminated. And as to owners of all the other lands, the Sec. 552 of the Civil Code, in express terms, declares that "such persons shall be entitled to the continued use of said water, upon the "same terms as those who have purchased their land "of the corporation." This right the corporation had voluntarily recognized for more than the five years, necessary to create the title to the easements by prescription alone. And this parity of right is expressly conceded in the bill.

The importance of the consideration that all those easements are freehold estates, lies in the fact that if the corporation may increase the annual rate at all, beyond the rate at which the estates vested, in order to make or increase net revenue, then the grantor may at its pleasure, derogate from its grant. This may not be done directly or indirectly.

Hence also all the allegations in the bill relating to a bonded indebtedness of \$300,000 incurred by the corporation relate to a false quantity. The bill does not state whether the water system was mortgaged to secure any such indebtedness, nor does it state whe-

it was incurred, whether before or after the vesting of these easements.

But if the indebtedness was incurred before the easements vested, even though it had been secured by mortgage on the system, then it was the duty of the corporation to protect its freehold grants of easements against it; if it arose afterward it could have no possible relation to the easements. So that in either case it does not lie with the corporation to throw the burden of its debt upon the owners of these easements.

It will be observed, as has been remarked in some of the cases, that these water corporations are in some respects *sui generis*.

In this State they must be considered as organized so far forth for the very purpose of the sale and rental of irrigation easements, as we take occasion hereafter more fully to show. All creditors of the corporation, even mortgage creditors upon the system, are bound by this important fact; and their rights must be subordinate to the leading purposes for which these corporations are granted their franchise. When the question shall arise, as it does not in this case, it may be found upon a full exploration of the public use in the water devoted to such sale and rental, that there is an important limitation upon the power of such corporations to mortgage, or rather as to what they can mortgage under their system, where they attempt so to do; and that this limitation differs from the case of

railway corporations and the like, in the fact that an essential function of the water corporations is to grant to individuals servitudes upon the water systems, which is not true of other corporations.

It may be found that the rights of creditors, mortgagees and others as against the owners of freehold easements, are circumscribed by what shall be deemed and accepted as the legally established rates at the time when the easements vested and at which they vested.

But in this case, as will appear, the court "cared for none of these things" and considered nothing but the abstract question of power of the corporation to raise rates in its discretion.

It is to be borne in mind that the matter of the current maintenance, management and operation of the water system, upon which servitudes, whether freehold or leasehold, are created, is entirely distinct from the grant of the easement itself; as distinct as ~~a~~<sup>the</sup> covenant to care for property is distinct from the grant of title to the property itself.

The distinction has always been recognized in the law of easements.

"It is in the nature of a servitude not to constrain "any one to do, but to suffer something, *ut aliquid patiatur aut non faciat.*"

Wash. Eas. & Serv. p. 5; *Bean v. Stevenson* 104 Cal. 49, 55-6. Goddard on Easements, pp. 18, 285, 443.

Austin's Jurisprudence, as abridged by Campbell (Holt Co. Publishers, p. 178) puts this clearly as follows in speaking of the *servitus* of the Roman law, as a right in *rem*:

"But this *negative* and *universal* duty, is the only "obligation which correlates with the *jus servitutis*. "Every *special* obligation which happens to regard or "concern it is a duty answering not to the *jus servitutis*, "but to some right extraneous or merely collateral to "it; e. g. the *owner* of the subject may have granted "an easement over it, and covenanted with the grantee "for quiet enjoyment. The grantor here lies under "two duties which are completely distinct, and disparate although the objects of the duties are the same; "one of these duties arises from the *grant*, and thereby "he is bound, like the rest of the world, to forebear "from molesting the grantee in exercise of the right "created by the grant—the other arises from the con- "tract by which he is personally bound."

Another passage from the same keen analyst is as follows: (*Ibid* Holt & Co.'s Ed. p. 394):

"No right of servitude can consist in *faciendo*; i. e. "can consist in a right to an *act* or *acts* on the part of "the owner or other occupant. This follows from the "very nature of a servitude, to which it is essential that "it should be *jus in rem*, or a right availing against "persons generally; for if it consisted in a right to an "act to be done by the owner, or other occupant, it "would be merely *jus in personam* against that determinate party."

"In the case of servitudes, the *jus in rem* may happen to be combined with a right to an *act* against the "owner; e. g. a right to have a way repaired by the "owner."

The distinction is strongly brought out in *Cole v. Hadley* 162 Mass. 579; 39 N. E. Rep. 279, 280, where holding that the grantor of a right of way is not bound to work the way so that it shall be fit for travel, unless he has promised so to do, the court go on to say:

"If the defendant promised to do this, it may be shown by oral evidence, as a collateral independent contract; but a right of way is an easement in land, which cannot be created by an oral promise or established by oral testimony if the statute of frauds is pleaded."

This distinction is in fact and substance, recognized by the statute of 1885, when in Sec. 4, it enjoins upon Boards of Supervisors to estimate as to water corporations, *first*, the value of all their property used and useful to the appropriation and furnishing of water; *next*, "their annual reasonable expenses, including the cost of repairs, management and operating such works"; and in Sec. 5, to so adjust rates "that the net annual receipts and profits thereof to said . . . . corporations shall not be less than six nor more than eighteen per cent upon the said value" of the water systems.

Therefore, *pro rei natura*, there is no embarrassment in considering the servitude apart from the maintaining it in operation; and so no difficulty in liquidating or making satisfaction of the purchase price of it once for all and in eliminating all questions of net rentals, while the annual expenses for maintenance, management and operation to be met by rates go on, as they must, because they are recurring expenses.

The personal duty of the corporation after having

granted the servitudes upon its system as appurtenant easements to the lands of the defendants, is to manage, maintain and operate its system. For the source of this obligation, we may, in all branches of this case, look to the clause in its corporate articles and franchise investing it with the power, and therefore the duty, of the "maintenance of dams and canals for the purpose of water works, irrigation, etc.," also to the general incidental powers recited at the close of the extract from its articles set forth in the answer (Trans. fol. 19). This is also consistent with its contracts that the water shall be delivered by it on the land irrigated. ( Trans. fol. 30, 32).

And this duty is thrown upon it by its receipt of the annual rates.

Reference is here made to the distinction between the *jus in rem*, being the servitude proper, and the *jus in personam*, being the right to have the company maintain and operate the system, to point out that they have no necessary connection; that the price of the servitude may be paid or otherwise satisfied once for all; that when so satisfied the element of rates to yield net revenue is forever gone, except so far as included in the annual rate expressly consented to; while the compensation for the continuing maintenance and operation may, indeed must, go indefinitely.

## IV.

**Yet the Circuit Court ruled that no contract could be lawfully made between the owners of land and the corporation owning the water system, either for the creation of irrigation easements, or the terms upon which they should be enjoyed.**

So much of the opinion of the court below as holds that a water corporation has no right to exact payment of the price of a water right as a condition upon which it will furnish water at rates adjusted to yield both net revenue on the value of the system, and also the expense of maintenance and operation, concurred in. But pointed out that this furnishes no foundation for the position that the corporation cannot sell the perpetual easement if the irrigator is ready to buy at a lump price agreed upon.

We have thus far travelled in this argument in entire amity with the opinion of the court below, in recognizing the perpetual easements to the parcels of land owned by the appellants.

We follow it without disagreement one step further, in accepting the position that where water rates have been fixed by public authority to provide (using the terms of the Act of 1885) both for annual cost of repairs, management and operation of water works, and also to yield net annual receipts and profits upon their valuations, no right exists on part of the corporation to refuse to initiate (or when initiated under such rates to continue) a supply for irrigation of a given

tract of land unless in addition to such rates, the would-be irrigator *purchases* and pays for his perpetual easement; for, it must be patent, that the corporation cannot have the legal right to "eat its cake and have it too;" it cannot *exact* and *hold* full payment of the value of the perpetual easement, and also have the legal uncovenanted right to collect net annual revenue in form of rates on that value.

It was said with undoubted correctness by this court in *San Diego Land & Town Company v. City of National City* (May 22, 1890,) 174 U. S. 739, 758-9:

"In our judgment, the defendant correctly says in "its answer that the laws of the State have not conferred upon it or its Board of Trustees the power to prescribe by ordinance or otherwise that the purchase and payment for so called water rights should be a condition to the exercise of the right of consumers to use any water appropriated for irrigation "or affected with a public use."

The learned Circuit Judge, Ross, uses in his opinion the following language (76 Cal. p. 333):

"It is impossible to reconcile the declarations of the Supreme Court of California in either of the two cases last referred to, or in any other case to which "my attention has been called, with a right on the part "of any corporation appropriating water under and by "virtue of the Constitution and laws of California for "sale, rental or distribution, to exact any sum of money "or other thing, in addition to the legally established "rates, as a condition upon which it will furnish to consumers water so appropriated."

This language, upon the assumption that "the le-

"gally established rates" are fixed with a view to cover both maintenance and net revenue, we can also accept.

*Wheeler v. Irrigating Co.* (Colo. Sup. 1888) 17 Pac. 487.

*Combs v. Ditch Co.* (Colo. Sup. 1892) 28 Pac. R. 966.

*Northern Colo. Irrigation Co. v. Richards* (Colo. Sup. 1896) 45 Pac. R. 423, 425.

But this is not conceding that rates to embrace net revenue, can be increased by public authority, in cases where the easement has been bought and paid for; or otherwise voluntarily annexed by the corporation, at a rate then established; or that rates where they have been fixed by the express or implied agreement of the parties, or their established practice can be increased by public authority, in order to enhance the net revenue of the corporation.

Undoubtedly the laws of this State, as those of Colorado, and we suppose of every other State and Territory where irrigation is a necessity, extend to the land owner the right to elect between what our Constitution terms the appropriation of water for *sale* and that for *rental*. If he prefers, he has the right to render to the corporation furnishing water returns by way of annual rates, rather than to commute such rates, by making purchase and full payment in lump sum for the freehold easement.

Such a regulation of the relation between com-

panies and irrigators for the protection of the latter, seems to be perfectly in harmony with the devotion by the company of its property to the sale or rental of water, and within the legitimate exercise of the power of regulation, because of the natural monopoly which such companies have, affecting the public interest.

We fully agree then, that the land-owner, if he prefers, may enjoy his easement of water supply upon the principle of *renting* it, and so paying annually to the company over and above the current expenses of maintenance, a proper net revenue for the use of the easement; and, that he cannot be compelled to buy and pay for the absolute title to it, unincumbered by the obligation to pay net income.

But to conclude, as the opinion seems to do, (76 **Fed.** 333.337,) that because the corporation cannot compel the land owner to buy an easement, it must follow that, it cannot sell it to him, if he is willing to buy, as in the cases alleged in the answer, would be a pure specimen of the *ignoratio cluchi*--a perfectly irrelevant conclusion.

Here we part ways with the opinion.

#### A.

##### **Enumeration of Constitutional and Statutory Provisions involved.**

The Constitutional and Statutory provisions to be considered, are Art. XIV of the State Constitution; the Act of May 14, 1862; the Act of April 3, 1876; be-

ing Section 552 of the Civil Code; the Act of March 12, 1885; and the Act of March 2, 1897, adding a section to said Act of 1885.

These are copied in their entirety in the appendix to this brief. Art. XIV of the Constitution so far as pertinent is as follows:

"Section 1. The use of all water now appropriated, "or that may hereafter be appropriated, for sale, rental "or distribution, is hereby declared to be a public use, "and subject to the regulation and control of the State "in the manner to be prescribed by law."

"Section 2. The right to collect rates or compensation for the use of water supplied to any county, "city and county, or town, or the inhabitants thereof, "is a franchise and cannot be exercised except by authority of, and in the manner prescribed by law."

#### B.

**Further statement and analysis of the construction placed by the court below upon the provisions of Article XIV of the State Constitution and of the statutes involved, as prohibiting contracts with comment upon such construction, and its difficulties.**

For the present considering only the provisions of the Article XIV of the State Constitution and the legislation prior to the Act of 1897 amendatory of the Act of 1885, we inquire where is found the express or implied prohibition against contract relations between the owners of the dominant and servient estates, respecting what the Constitution terms "rates or compensation for the use of water supplied"?

No express prohibition is anywhere declared. If it exists, it must be inferred as necessarily implied in the Constitution and statutes.

**The Essence of the View held by the Court Below.**

In the effort to get a fair and full comprehension of the view of the court below, we quote further from its opinion; and first, the following: (76 Fed. R. 336, italics ours):

"Since to make good the appropriation, it is essential that the water be applied to some beneficial use, these provisions of the statute (of March 12, 1885,) of themselves necessarily pre-suppose, that, until the action of the Board of Supervisors is called into play, *the parties furnishing the water must designate the rates.* It cannot be furnished for nothing. The law does not exact that, nor has any consumer the right to expect it.<sup>1</sup> The statute evidently proceeds upon the theory that the rates charged by the person, company or corporation, may be satisfactory to the consumers,<sup>2</sup> in which event there would be no occasion for the intervention by the Board of Supervisors.<sup>3</sup> Until that time the rates established and collected by the person, company or corporation furnishing the water prevail. This, it seems to me, would be the true and obvious construction of the statute if it had not been so declared in terms. But the statute does so declare in terms, and in these words:

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(1) This is stated by the court evidently as a general proposition, and not as based on the facts of the case, which are that the rate of \$3.50 per acre per annum was the actual irrigation rate established and collected at the institution of the suit and for all the time prior thereto, during which the system had been in operation, i. e. over eight years.

(2) The record shows that the established rate of \$3.50 was satisfactory to the consumers.

(3) The statute nowhere provides that consumers *as such*, can call in the intervention of the Board of Supervisors. It is *inhabitants and tax-payers* who are competent petitioners to the Board.

"Until such rates shall be so established (namely, "those first established by the Board), or after they "shall have been abrogated by such Board of Su- "pervisors as in this Act provided, *the actual rates es- "tablished and collected*<sup>(1)</sup> by each of the persons, com- "panies, associations and corporations now furnish- "ing or that shall hereafter furnish appropriated wa- "ters for such rental or distribution to the inhabitants "of any of the counties of this State, shall be deemed "and accepted as the legal rates thereof." Act. Cal. "March 12, 1885, Sec. 5."

In the passage above quoted from the opinion, the court held, as exemplified in the decree, that the foregoing extract from Sec. 5 of the Act of 1885, empowered the corporation in its discretion, to change the rate from \$3.50 per acre per annum to \$7.00 per acre per annum, against the will of the community of irrigators. The remaining portion of the opinion is devoted to the proposition that this hypothetic power of the corporation to change rates is of such nature that it cannot be abridged, limited, qualified or in any way controlled by the corporation's own contracts.

We continue with the following quotation from the opinion, which in connection with the extracts above set out, present the rationale of the decision. The court went on to say (*Ibid* 337):

"The views above expressed are conclusive against "the position of the defendants, unless it be, as claimed "by them, that the comp'ainant is estopped from mak- "ing *any changes in the rates* at which it has heretofore "furnished the defendants with water, or that the wa- "ter is so far private property as that the parties to the

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(1) This was when the bill was filed \$3.50 per acre per annum.

"suit could make valid contracts in respect to the rates "at which the company should furnish it to the defendants.

"If the company is a *private* corporation, and the "water private property, this would undoubtedly be "so; but if the complainant is a *public* or *quasi* public "corporation, and the water in question is, and at all "times mentioned has been, charged with a public use, "it is not true; for nothing can be clearer than that, in "respect to such water, *rates established in pursuance of law must control, and that no attempt to ignore that control, and to establish them by private contract is of any validity . . .* (and *ibid* p. 338). As the water in "question from the moment the appropriation became "effective, became charged with a public use, it was "not in the power of either the corporation or of the "consumers to *take away or abridge the power of the state to fix and regulate the rates*".

"All persons are presumed to know the law, and "those who bought lands from the complainant cor- "poration upon its representations that water for irri- "gation would be furnished at the annual rate of \$3.50 "an acre, or otherwise acted or contracted with ref- "erence to such rates, must be held to have known "that the Constitution, conferred upon the legislature "the power, and made it its duty, to prescribe the man- "ner in which such rates should be established. This "the legislature has done by the Act of March 12, "1885. As by that Act the legislature deemed it "proper to allow the action of the Board of Supervis- "ors to be invoked in the first instance only by 25 in- "habitants, who are taxpayers, of the county, and "until then to leave the designation of rates to the person, "company, or corporation furnishing the water, to hold "valid and binding any contract between parties with "reference thereto would be, in effect, to ignore and set "aside the provisions of the statute upon the subject; for "it is plain that a contract must bind all parties to it, or "it binds none; and, if binding at all, its manifest effect "would be to remove from the regulation of the state the "rates in question, and leave them to be governed and "controlled by *private contract, or such representations "and acts as may amount to the same thing.*"

To get the full significance of this pregnant pronouncement, it must be borne in mind, that in the case in which it was made, it appeared that the Board of Supervisors had prescribed no rates and had never been called upon to act, yet the system had been in operation for eight years.

Also, that a uniform annual rate of \$3.50 per acre had been the only actual rate established and collected by the corporation, and was co-incident and identical with the alleged contract rate, and was satisfactory to the consumers.

Therefore, the question on the record was not between the alleged contract rate of \$3.50 an acre annually and some different rate limited by the Board of Supervisors—as to whether the one, or the other should prevail.

But the suit arose out of the fact that the company had given notice to the appellants that on January 1st, 1896, it would establish a rental of \$7.00 per acre per annum for water for irrigation and that from that day they would be required to pay that sum; and from the fact that the Receiver, after his appointment and before said date, gave a similar notice. (Bill trans. p. 11). This new rate the defendants refused to pay. The Receiver then shut off the water and brought this suit.

The question then actually before the court was, whether it was competent to set up the alleged con-

tract and actually established and collected rate of \$3.50 against this *ex parte* \$7.00 rate so "designated" and demanded by the company and its Receiver; and for the Receiver to enforce the collection of the same by summarily shutting off the whole water supply.

It follows, that when the court said in its opinion, that "it was not in the power of either the corporation "making the appropriation, or of the consumers, to "make any contract or representation that would at all "take away or abridge the *power of the state to fix or regulate the rates*," it meant to say, and did say, that when the corporation gave the notice for the future \$7.00 rate, and promulgated its future requirement to pay it, it acted as the vice-gerent of the state and wielded its sovereign power to fix anew and regulate the rates, and that its own contracts should not stand in the way of its exercise of such power.

Before the appointed date of January 1, 1896, however, (in fact Sept. 30, 1895, Tr. p. 8) the corporation had gone into the hands of Lanning, as Receiver, for the Circuit Court. Consequently, it was not in position to demand anything at the time set by it for requiring the new rate.

But the Receiver had given the similar notice before January 1, 1896, and he it was who shut off the water and by this suit sought to make *his* notice, requirement and proceedings effective.

So it actually was the Receiver of a United States Court, who in its view, was the State *pro hac vice* and exercised the State's sovereignty to fix anew and reg-

ulate anew the rates. Whether the theory was that he succeeded to this authority as incident to his possession of the assets of the corporation, is not explicitly stated; but seems to be assumed by the court. And it was held that the contract and established actual rate of his insolvent corporation should not stand in the way of his enforcing his requirement.

That this is the only construction the rulings and opinion will bear, is shown by the succeeding context.

The court says: "The Constitution conferred upon "the Legislature the power and made it its duty to "prescribe the manner in which such rates should be "established. This the Legislature did by the Act of "March 12, 1885. As by that Act the Legislature "deemed it proper to allow the action of the Board "of Supervisors to be invoked in the first instance, "only by twenty-five inhabitants, who are tax-payers "of the county, and *until then to leave the designation of "the rates to the person, company or corporation furnishing the water, to hold valid and binding any contract "between the parties in reference thereto would be in effect to ignore and set aside the provisions of the statute "upon the subject."*"

This passage we submit can bear no other meaning than that the designation of this \$7.00 rate by the company and its Receiver was the exercise of a statutory authority; that such authority stood on the same plane with the authority granted to the Board of Supervisors; and because it was of such character, it could not be abdicated by the company, nor limited or controlled by its own contracts.

The same thought is reiterated in the passage

of the opinion immediately following, speaking of contract between corporation and consumer.

"If binding at all, its manifest effect would be to remove from the regulation of the State the rates in question, and leave them to be governed and controlled by private contract, or such representations "and acts as amount to the same thing."

The specific "rate in question" was none other than this \$7.00 proposed rate, and it was that which the court refers to as "the regulation of the state", and therefore above the reach or control of the corporation's own contract.

And finally that there may be no mistake of its meaning the court uses this language:

"No company or corporation charged with a public use can be estopped by any act or representations from performing the duties enjoined on it by law."

What was this *duty enjoined on it by law* thus assumed to exist?

It was nothing else in this specific case, than the exercise of power by the corporation and its Receiver to establish the \$7.00 rate in contravention of the contracts for the \$3.50 rate; and what comes to the same thing; also in contravention of the fact that the \$3.50 rate alone was, and for eight years had been, the uniform actual rate established and collected.

This power thus asserted for the corporation and its Receiver, is the power of regulation; it is the power

of a political superior; and as said by Chief Justice Waite in the *Railroad Commission* cases 116 U. S. 307, 325: "*This power of regulation is a power of government.*"

Thus it is plain that inasmuch as the statute of 1862 granted to water companies the right "to establish, collect and receive rates, water rents or tolls"; and Sec. 552 of the Civil Code declares that perpetual easements vest "at such rates and terms as may be established by said corporation in pursuance of law"; and the Act of 1885 employes the phrase that until the law should have fixed maximum rates for the sale or rental of water furnished, the "actual rates established and collected by the corporation" should be "deemed and accepted to be the legally established rates"—the court considered that the Legislature had delegated to the corporation the *governmental* and sovereign authority not only to establish the original rate of \$3.50, but also to repeal the same and from time to time to enact and *establish* new rates. The idea was expressed in the argument of the learned counsel for the Receiver in his very able brief to the court below, as follows: "The rates fixed by the company are *changeable*—*by it the same as by the Board of Supervisors.*"

Or, as was expressed by other counsel acting as *amicus curiae* in *San Diego Flume Company v. Souther et al.*<sup>96</sup> Fed. 96, 164, now pending on rehearing in the Circuit Court of Appeals for the Ninth Circuit, in his brief on such rehearing in seeking to uphold the doctrine of the opinion of Judge Ross in this case. "This power

"of fixing and establishing rates, by whomsoever exercised, whether by the *corporation itself* or by the "Board of Supervisor, *is a legislative function.*"

Thus power of the State to regulate and control the corporations in charge of the public use, is to be made effective, by simply delegating that power to the corporations themselves.

And the term *quasi public*, which was invented to express the conception that the corporation was subject to law, has suffered a sea-change, to mean that the corporation is the law maker and superior to its contracts.

The outcome of the application of these principles and this construction of the State Constitution and statutes to the case was, that the Receiver of the Kansas corporation was sustained in doubling, against the will of appellants, the actual irrigation rates that had been established and collected for so many years, under the entire system outside of National City, and in depriving the appellants of their water supply to enforce payment of the increased rate; the appellants were enjoined from suing in the state courts or elsewhere to prevent the obstruction of their use of the water, or for the injuries sustained thereby; the court refused to hear their defenses—that their perpetual easements had been bought and paid for, or otherwise acquired under the voluntary offer of the company, and were free from incumbrances, except for payment of the annual rental rate of \$3.50 per acre per annum, as fixed either by express agreement with the company,

or by the long continued practice of the parties; and the court also declined to inquire whether the increase of rate was reasonable.

But we apprehend that the fact of the existence of irrigation easements as an institution of private property, is the key to the true meaning of the Constitution, when it uses the terms "sale" and "rental" and of the statutes when they speak of rates "established" by the corporation.

And we submit, upon considerations to be stated, that a construction of the provisions of the Constitution and statutes which led to these results, is erroneous.

But if not erroneous that these provisions themselves are in conflict with the National Constitution.

And in either case, that the Acts of the Receiver and the judgment of the court were an unconstitutional exercise of the power of the United States.

For if such easements are individual property (which we shall assume to be true) then it is not a reasonable construction, if any other more reasonable can be found, which imputes to the statute the intention to declare in one breath that such easements are perpetual, and in another to put them for so much as a single hour, at the mercy of the corporate owner of the servient estate, by arming the corporation with the high prerogative power, inalienable and uncon-

trollable by its contracts, to repeal existing rates and enact new rates for its own benefit and at its own pleasure, and enforce them by summarily suspending or destroying the enjoyment of the easement, as was done in this case.

It is no answer to say, as did the court below, that if the new rates thus fixed are not satisfactory to the owner of the irrigation easement, he is at liberty, provided he is an inhabitant and tax payer, to unite with 24 other such persons (if he can induce them to join) in a petition to the Board of Supervisors to establish the rates. For this begs the question and assumes that the corporation has the right to change the rate; which is the very proposition to be established.

Moreover, (passing by for the present the grave questions not directly arising upon the facts whether the Board can at any time increase or diminish the rates in force when the easement vested, in order to increase or diminish the net revenue of the corporation) it is evident that the power of the Board, in any event, is not retro-active, but prospective; it is not judicial; but it is to prescribe rates which shall be charged in the future; and that is a legislative act.

*Commission v. Railway Co.* 167 U. S. 479, 499.

It gives no remedy against arrears of increase, or past accrued increases of rentals, or against forfeiture of the easement for non-payment of them. This is illustrated by the decree in the original case entered February 12, 1898, by which the defendants were "re-

"quired to pay to the complainant \$7.00 per acre per annum for water furnished to their lands, as set forth in the bill of complaint herein, *from and after the first day of January, 1896*, until the fixing and establishing of such rates by the Board of Supervisors of San Diego County.....as a condition upon which water shall be furnished them by the complainant, and that upon failure of said defendants or "any of them to pay said rates the complainant....be and is hereby authorized to shut off the supply of water to such or any of said defendants who shall fail "for five days to make such payment (folio 103.)

How short the shrift permitted to defendants, before shutting off the water, is apparent, when it is remembered, that the new rate was noticed to take effect Jan. 1, 1896, and that the bill was filed Jan. 6, 1896, and alleged that the water had already been shut off.

This then is a present and pertinent illustration, that in no view of the powers of the Board of Supervisors can they be made available to correct retroactively any exactions by way of increase of rates, or to relieve past forfeiture enforced.

And not only is this so, but suppose by way of further illustration that such an ordinance had been passed and were attacked by the company in an action in the court below, to set it aside as unreasonable, and at the end of some years litigation, it should be set aside, then as this decree is drawn, the \$7.00 and all the increase would be enforceable for all the intervening time, with its reasonableness not only unadjudicated, but with defendants under an injunction not to bring any suit to procure its adjudication.

Nor, upon the court's own view, is it any answer for the corporation, or its Receiver, to argue in support of the correctness of this construction, that this sovereign power supposed to be delegated to the corporation is not unlimited, but must be exercised reasonably. For the court expunged from the answer all the allegations bearing upon the question of the reasonableness of this increase, such as among others, that the ownership of the easements had been paid for; that only one-half the capacity of the system was in use; that this, with the irrigation rate at \$3.50 would yield rentals to amount of \$27,000 per annum; that the expense of maintenance of the *whole* system and the operating it so far as in use, was not to exceed \$12,034.97 per annum; that the value of the whole system was not to exceed \$300,000; and the court declined to go into the question of such reasonableness in the following language (76 Fed. R. 319 at p. 336).

"Should the rates fixed by the Board designated by law for the purpose be so unreasonable as to justify the interposition of a court, any party aggrieved would have his remedy in the appropriate court, by which such unreasonable rates would be annulled, and the question again remitted to the body designated by law to establish them. But in no case would the court undertake to do so. *Reagan v. Trust Co.* 154 U. S. 420; *Railway Co. v. Wellman* 143 U. S. 339; *Santa Ana Water Co. v. Town of San Buena Ventura* 65 Fed. 323.

*Therefore, it is not for the court in the present case to go into the question of the reasonableness of the rates established by complainant, and which it seeks to enforce. If unreasonable, and the consumers are for that reason dissatisfied therewith, resort must first be had to*

"the body designated by law to fix proper rates to-wit, the "Board of Supervisors of San Diego County."

It follows then from the judgment of the court, that not only was the corporation, and its Receiver, upheld in repealing the old and legislating in the new rate, but it and he were accorded the sole prerogative of deciding upon the reasonableness of it for an absolute period of time i. e., until an ordinance fixing rates is passed, and for an indefinite contingent time longer, in case a successful attack could be made upon such ordinance in the courts; and it was also upheld in executing its judgment by shutting off the water from whole communities, including three school districts made defendants, which it did before it resorted to the court.

A more extreme instance, under a government of laws and not of men, in which one party to a property relation, has been sustained in combining in itself the functions of legislature, court and executive in its own case, one would venture to think it hard to find.

It is true that if the court had undertaken to decide the question whether the attempted increase of rate to \$7.00 was *reasonable*, it would have been awkward for the theory asserted by it that the consumers could resort to the Board of Supervisors, if that rate was not satisfactory. For this would be virtually an appeal from the decree of the court to the Board, on the question of reasonableness of the specific rate; it would be a reversal of the more usual course, suggested indeed in the opinion, of application to the

proper court to test the reasonableness of the rates fixed by the Board. Or, if a decree of the court as to reasonableness, were to be treated as *res judicata*, the vocation of the Board would be gone. And the court would have established the rate instead of the Board and would have assumed functions more akin to legislative or administrative, or both combined than judicial. This difficulty the court seems to have found to be an insurpassable objection to passing upon the question of the reasonableness of the \$7.00 rate made by its own receiver.

But on the other hand, if a court by its injunction ties up the defendants hand and foot, from resisting an increase of rate to which they never consented; which is double that to which they have assented; which under the facts alleged in the answer is unreasonable; and makes them submit to the deprivation of their easements unless they pay the increased rate; and at the same time refrains from investigation as to whether the rate is just and reasonable, all upon the theory that the corporation is not private but public, and that its raising of the rate is a purely public and governmental act, which must not be questioned or examined by the court—but only enforced—how can all this be reconciled with the conception of private property in a perpetual easement for irrigation? Under such a judgment it is not property; but a mere enjoyment upon the sufferance of the corporation—a bare license which can be terminated at any time by raising the rent to any amount in the discretion of

the corporation; for there can be no difference in the principle whether the annual rate is thus summarily raised to \$7.00 or to \$700 per acre. If the court cannot question the reasonableness of the one, it could not question the other. If it must enforce the one by upholding the forfeiture of the right, it must enforce such another in the same way.

Thus the court which was asked in this case to enforce the increased rate on the assumed premise that the company or its Receiver could make *any* increase against the will of the defendants, was confronted with an excruciating dilemma; it had either to try the question whether the increase was reasonable, or refuse to try it. If it did try it, the court would have established the rate and would thus have destroyed the supposed function of the Board of Supervisors, who could not be permitted to overrule the court's decision upon the reasonableness of the increase. But if it did not try the question, then the court must enforce this increased rate, even at the alternative of destroying the easements, without so much as an inquiry as to whether the increase was reasonable, and in full face of the fact that the Board could not relieve against the forfeiture.

The court chose the latter of the two alternatives and decreed accordingly.

An assumed premise which presenting such a dilemma, resulted in such a judgment, is worthy of re-examination in this court.

Nor is it any answer to say that if the defendants did not desire to be put in such a predicament, they should have anticipated the action of the company, or rather of its receiver, by resorting to the Board in advance of January 1, 1896, the time at which, according to the notice, the required increased rates were to take effect.

For (waiving the question whether the Board has any jurisdiction to deal with *vested* easements to create, or increase or diminish net-revenue to the company) it is not a reasonable construction which makes it the statutory design to give the corporation the power to pursue the irrigator with so destructive a weapon, and drive him to the Board.

If the statute says any one thing in clear and unmistakable terms, it is that the petition of not less than twenty-five inhabitants and tax payers (let it be observed not consumers as such) shall be *their voluntary* act; and not a compulsion of the corporation exerted vicariously upon existing consumers, who may, or may not be either inhabitants or tax payers. The statute has in terms denied to the corporation power or authority to *initiate* a proceeding before the Board to fix rates.

What is thus denied directly, should not be read into the statute as granted to the corporation indirectly in the form of so drastic and doubtful a power as the supposed one of increasing rates *ad libitum* to affect *vested* easements, and to enforce payment

summarily in advance of any adjudication of the rightfulness or reasonableness of the increase.

But there is a further fundamental and insurmountable objection to the sufficiency of the supposed remedy of resort to the Board to obtain redress against corporate changes of existing rates; that is the objection that the invoking of such remedy would be conditioned upon the consent of others than the individuals whose easements are affected. As such easements are individual property, so must the right to resort to a public tribunal for their protection, be individual and unconditioned upon consent of any other person whomsoever. It is unreasonable to construe the statutes to put so great a power in the hands of one party to a property relation and to hamper the other party by the necessity of obtaining the consent of twenty-four other inhabitants and taxpayers, if he has the like qualifications; and if as in case of the three school corporations defendants, there is lacking the qualification of being tax payers; or, if as in the case of a number of the defendants, they be not inhabitants, then to burden the party with the necessity of obtaining the consent of twenty-five qualified persons, before he can so much as apply to the Board.

Neither is this objection answered by the suggestion in the following language of the opinion (76 Fed. R. at p. 339):

"It will hardly be contended that the defendants, 'by reason of any of the express contracts pleaded in

"defense to this suit, or of any contract growing out of "the representations alleged to have been made by "the company, would be estopped from applying to "the Board of Supervisors of the county for establish-  
"ment of rates."

It is a very grave question, whether any of the defendants can throw off their contracts on their election to apply to the Board to fix rates. The question does not arise on this record. And we do not stand in any way committed to the assertion that they can thus supersede their contracts; our impression is very strongly against the existence of any such power; but we reserve the right to examine the question on its merits when it shall arise in a proper case. Neither is the question whether existing consumers can apply to the Board, the converse of the question, whether the company can raise the rates; for the reason that there is a very great difference between one party to a property relation applying to a public tribunal, and the other party judging its own case.

But one clear assertion of opinion we can make, that any contract relating to the title to the easement and the consequences of such contract and title, and any contract so far as it relates to maximum net profits or returns to the corporation, is everywhere and at all times binding on both parties; and beyond interference by any form of public authority.

Nor is it any answer to say that because the Constitution declares that use of water appropriated to sale, rental or distribution is a *public use*, it must fol-

low that the whole matter is under government administration and that there can be no contract relations.

We inquire what is the "public use" of water declared by the Constitution? We do not essay a comprehensive definition. We can only seek to specify some things which it does and some things which it does not denote, pursuing the safe process of "inclusion and exclusion," in which phrase Justice Miller characterized the history of the common law, "moving from precedent unto precedent."

*And first.* This "public use" does *not* mean ownership of water or the works by which it is supplied, *by the organized public*, as e. g. the state, a city or an irrigation district. Either of these public corporations may own a water system and a water supply appurtenant thereto. It would, however, be strange supererogation for the Constitution to declare the use of water from such a politically owned water system, (for such the system would be in the strict sense) a "public use"; or to declare the power to collect rates or compensation from consumers for water furnished from such a system, a franchise; or, to provide for rates fixed contingently by a Board of Supervisors to yield net receipts or profits of not less than six per cent on the value of the works of such a public system. The public use involved in public ownership is therefore different from the "public use" referred to by the Constitution.

The whole round of constitutional and statutory principles and of the scheme of regulation and control, relate to water systems, in the language of Sec. 4 of the Act of 1885, "*belonging to and possessed by each person, association, company, or corporation, whose franchise shall be so regulated and controlled.*"

Therefore these provisions of the Constitution and statutes do not pertain to water systems owned by the state or any political sub-division of the state. This obvious truth was pointed out as long ago as 1882, in *People v. Stephens* 62 Cal. 209, 237.

Neither does this "public use" imply the expropriation of the private owner of such water systems, and the vesting of such ownership in any political body. This upon constitutional principles cannot be done except upon "just compensation having been first made to, or paid into court for the owner." Art. I, Sec. 14 of the State Const.

*Second.* Such "public use" is not inconsistent with the creation of private servitudes upon the water systems, annexed as perpetual easements to land in private ownership. Sec. 552 Civil Code. *Merrill v. Southside Irr. Co.* 112 Cal. 426.

*Third.* Artificial conduits are as capable of being subjected to irrigation servitudes as the streams on public lands. 21 Pac. Rep. 1028-1030.

In the following respects irrigation servitudes created upon artificial water systems and those cre-

ated on streams on public lands, are strictly analogous.

a. Both must be created by the owners of the servient estates i. e. by the acts, sufferance or grant of the owner, availed of by him who acquires the easement to his land. See Sec. 804 Civil Code, (Appendix).

Therefore "the appropriation" i. e. devotion by the corporation of water to "sale rental or distribution" of which the Constitution speaks, is an act of the same quality as the consent of the United States and of the state, to appropriation of the use of water from public lands, evidenced by the Acts of Congress recognizing and confirming water rights (Rev. Statutes Secs. 2339, 2340) and by the chapter of the Civil Code on water rights by appropriation (Appendix).

b. They are precisely alike in that when the owner of the servitude or his successor in interest ceases for five years to use it, the right to the servitude ceases as against another user.

They differ in that the grant or creation of the irrigation easement on the artificial system is generally by way of sale or rental i. e. for a consideration; while such servitudes upon the natural streams or sources of supply on public lands are the free gift of the government conditioned only on continued beneficial user. This difference is not an essential one; for the governments might have set prices upon these servitudes or burdens upon their lands, with exactly the same right and authority as when prices were set upon lands

thrown open to pre-emption, or other methods of disposition of lands of the United States, or on the school or swamp lands of the state.

The difference is that of the bounty of the government, but let it be noted, that the grant by it without exacting a price, is just as final and irrevocable, as though made for a price.

Should the government construct artificial water works, doubtless it would fix prices upon such ownership.

c. Until the government constructs irrigation works on its own lands, it grants only the strict servitude.

When it shall construct artificial works, it would add to this, the self-imposed obligation to manage, repair and operate, and would then in this respect be in the similar situation with private\* corporations whose corporate function it is to do this.

*Fourth.* Involved in what has already been stated, but of so great importance that it is worthy of separate statement, is the fact that whether in the case of artificial systems devoted to the sale, rental and distribution of water, or, in the case of sources of supply on government land open to appropriation, the use of the water is thrown open to the public to be used: *but the moment one of the public avails himself of the use, that use is withdrawn from the offer to the public, and the right to it becomes private property.* So that the power

either of the government or of the private corporation, to create or grant new easements is limited by those already vested; and when the capacity of the supply on the public land, or of the system of the private corporation is fully in use, the power to create further easements ceases altogether.

For as between appropriations on public land the first in time is first in right. Civil Code Sec. 1414; so in case of private corporations the perpetual easement, implies the exclusion of all after use that would encroach upon it, or impair it.

Therefore one feature of this "public use" is, so to speak, like the opportunity to acquire property at a public sale, *it is public in order that it may become private.*

It follows that principally and perhaps, exclusively, it is this *process of passing and vesting* these irrigation easements in those who will use them, which the law can regulate.

Until there is a difference between the corporation which has made itself amenable to the duty of making the grants and him who would acquire the easement, there is absolutely no foundation for state interference.

If both agree—that is contract—interference by public authority is an impertinence and a mischief, or at least finds no warrant in the law as passed.

All these matters considered then, the inquiry remains, whether there is not a construction of the Constitution and statutes other than that adopted by the court, which is more in harmony with the existence of private property in irrigation easements, and which is not beset with so many difficulties.

We think there is such a construction; and that it is at the opposite pole from that adopted by the court, in that the former makes consent and consensual acts the essential element in the establishment of all the rates and compensation, here under consideration, instead of prohibiting them in the establishment of any, as does the latter construction.

#### v.

**Both branches of the ruling of the Circuit Court that there can be no contracts for the creation of water rights, nor any contract respecting water rates, are erroneous.**

**For given the institution of private property in water rights annexed to land in individual ownership, it follows implicitly that such easements are proper subjects of contract.**

**1st. For their creation.**

**2nd. As to the terms upon which they are to be enjoyed.**

This is so, under the terms of the Constitution, under the general law relating to the creation and enjoy-

ment of easements, and under the specific statutes involved.

I.

**The Constitution itself in terms recognizes and permits the appropriation of water to sale and to rental as well as to distribution. And a construction which would make the devotion of water to sale or to rental paralyze the power to make contracts to sell or rent, would make the constitution self-stultifying.**

The above proposition seems so self-evident, as to admit of as little argument as any other axiom. It was said in *Merrill v. Southside Irrigation Co.* 112 Cal. 426, 433:

"When water is designated, set apart and devoted "to purposes of sale, rental or distribution, it is *appropriated* to those uses, or *some of them*, and becomes "subject to the *public use* declared by the Constitution, "without reference to the mode of acquisition" (Italics those of opinion).

This exposition deserves careful attention. "Appropriation" to sale, rental or distribution, the court declares to mean simply *devotion to sale*, or *rental or distribution*; or to *one or more of those uses*. How can it be said that what the Constitution thus expressly contemplates, is forbidden? How is the antecedent capacity to sell, or rent or distribute which the Constitution assumes to exist, when it recognizes the voluntary power to devote water to such uses, destroyed by the very fact of its exercise? The notion is a mere phantasy.

The very fact of such voluntary devotion to some or all of the purposes of sale, rental or distribution to as many persons as the system can supply, but who are at the outset indeterminate and unascertained, makes the *use public*. This would be so even if the Constitution had not declared it.

It is this very business of sale, rental and distribution voluntarily undertaken by the corporation, which is subject to the regulation and control of the state. But the power to regulate and control such business is not the power to destroy either it, or the property rights by which it is carried on, or which become vested under it.

*Railroad Commissioner cases* 116 U. S. 307, 331.

The state does not own the business; it has not taken over the property; nor can it compel a single person to take water or to pay rates, who has not in some form by his own consent bound himself to do so. All it can do is to set reasonable limits to the corporation *within* which it may freely sell or rent easements.

It is proper here to notice that the proviso in Section 1 of Article XIV of the Constitution has no application outside of municipalities. Whatever there may be in that proviso for fixing hard and fast water rates, exclusively by municipal authority, has no application whatever in this case. That the Article was shaped by the constitutional convention *ex industria*, so as not to bring the irrigation and mining easements outside of municipalities within the operation of the

*proviso*, is conclusively shown by the debates and proceedings of the constitutional convention officially published. As appears in Vol. 3 p. 1371 of the official publication of the Debates and Proceedings, the proviso was introduced by Mr. Barber as an amendment to Sec. 1 as reported from the Committee of the Whole, and which was identical with the section as it now stands less the proviso. In his remarks in presenting the amendment, Mr. Barbour said

"As I understand it now, the provision and the "amendment will contain *two* methods of regulation. "One where water is furnished in ditches, say for instance, for the use of a *mining community*, or for the "use of an *agricultural community* under regulation by "law; that is to say, by laws enacted by the Legislature, or possibly by the delegation of the authority to "some local body. The other is for the regulation of "the subject where it condemns the supply of water for "domestic uses of the inhabitants of a *city* or *town* or "some other *incorporated political* sub-division of the "state, which has a body always able to exercise this "control."

And at the next session of the convention, Vol: 3 *ibid* 1372, Mr. Barbour asked leave to correct the proviso which he had offered "so as to make it apply to incorporated cities and counties, and towns", by striking out the word "county" wherever it occurred in the proviso as introduced. As so corrected, it was adopted. It must be remembered that "city and county" is the technical term in California for the consolidated corporation uniting the functions of city and county, whose boundaries are co-terminal, of which the city and county of San Francisco is an example.

Upon the motion of Mr. Herrington <sup>in</sup> the Committee of the Whole to adopt Sec. 2 of Art. XIV of the Constitution as an amendment in the form as it was finally adopted by the convention and now stands, Mr. Reynolds said (*Ibid.* Vol. 2, p. 1030).

"I will say . . . . that it is an attempt to reduce in "every possible manner, these corporations which undertake to furnish incorporated cities and towns with "water, to the control of law, and to make them "amenable to law, and make their operations to conform to law and established rules. This amendment "interferes not at all with the supply of water to miners, or to farmers for irrigating purposes."

The section having been re-read Mr. Reynolds further said (*Ibid.* 1030) :

"It interferes not at all with the mining or irrigation "schemes, but has reference only to the supply of water "to incorporated cities and towns. I hope the amendment will be adopted. We know what it means in San Francisco."

And so it was adopted.

While it is true that this Section 2 does apply throughout the state and not merely within municipalities, the foregoing extracts show that in the opinion of members of the convention the effect of both sections of Article XIV was to leave mining and irrigation interests outside of the rigid provisions adopted for cities and towns.

The Constitution establishes no scheme of absolute rates for the uses of water for mining and irrigation;

it leaves all control and regulation of the sale and rental for these uses to the Legislature.

So far then as the discussions of the convention throw any light upon the subject, it was not supposed that the status of mining and irrigating water rights was by either section of Art. XIV, revolutionized, so that they were no longer, as they always had been, perfectly capable of being the subjects of contract.

**The constitutional terms "sale," "rental" and "distribution," refer distinctly and appropriately to different methods of disposition of water.**

It is to be observed that the Article XIV itself in speaking of the *methods* of dealing with water, takes the distinction between "sale," "rental" and "distribution."

These three terms are not used pleonastically, but distinctively and appropriately. The debate in the convention above referred to, recognized important differences in the application of the regulating power under the Constitution, between mining and irrigation on the one hand, and purely city uses on the other.

When the Constitution was adopted, Sec. 552 of the Civil Code was in force, which declared the existence of the property institution of irrigation easements. This section, as above pointed out, is held by the Supreme Court of the State to consist with the Constitution. Therefore the Constitution itself embraces in

its comprehensive scope the subject of these easements, and we may look in it for fit descriptive words of the method for creating them and the manner of making recompense for grants of them when made by the corporation.

We find that the terms appropriate to the transfer and acquisition of easements, are the constitutional terms, "sale," and "rental"; while the term "distribute" is not appropriate. For no one would speak of *distributing* easements. The term "distribute" then must refer to the method of disposition of water otherwise than in the enjoyment of easements; that is it refers to the occasional, fluctuating and miscellaneous uses of water such as are common in, but not of necessity confined to, cities or towns. As to such uses formal contracts in advance of the use or otherwise are impracticable and unnecessary. There is therefore a solid reason for the marked distinction taken by the Constitution itself in the manner of applying the regulating and controlling power of the state in cities and towns from the method adopted outside.

These distinctions of method could not be maintained without recognizing contracts of sale and of rental, in dealing with the use of water. The distinction is barely adverted to, but still recognized by the Supreme Court in the case of *Merrill v. Southside Irrigation Co.* *supra* 112 Cal. 433, when it speaks of water appropriated to the purposes of sale, rental or distribution, *or some of them*.

It is to be noted also in connection with the fact that the Constitution preserves in Section 1 of Art. XIV,

the distinction between the sale and rental of water, that in Section 2 of the same Article it preserves the co-ordinated distinction between *compensation* and *rates*.

The term "*compensation*" has a well settled meaning in constitutional law. It occurs in the Declaration of Rights, Art. 1, Sec. 14, of the same Constitution, where it is provided that private property shall not be taken or damaged for public use without just *compensation* having been first made to or paid into court for the owner, etc.

There is no reason why the term *compensation* as used in Art XIV, does not cover the case of payment in gross or lump sum for a freehold irrigation easement. The use of the term certainly shows that the franchise of a water company is not confined to a scheme of annual rates, for enjoyment of the easement; but that it includes the taking of full payment for the title to it.

The term "*compensation*" as used in Sec. 2 of Art. XIV, is in fact the strict complement of the term "*sale*" as used in Sec. 1 of the same article; just as also the term "*rates*," as used in the Sec. 2 is the complement of the term "*rental*" as used in the former section.

But Sec. 2 of Art. XIV is much relied upon to support the theory of rigid and exclusive public regulation of rates and compensation.

The language of the section unquestionably does carry the *assertion* of the regulating and limiting power of law over the exercise of the right to collect rates and compensation for water supplied, to the extreme verge consistent with the "inalienable rights" of "acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness" (Art. 1, Sec. 1, Const. Cal.); and with the guaranty against the taking or damaging of private property for public use without just compensation first being made; and the guarantees against the deprivation of liberty or property without due process of law; but the section can and must be construed consistently with these primordial rights.

Inasmuch as the power or regulation and limitation asserted in the Constitution, so far as it applies to this case, is to be exercised as *prescribed by law*, the practical and specific inquiry is whether there is any *law*, which prohibits contract relations.

By the term *law*, as used in this Section 2, we apprehend is comprehended not only the statute law, but the general system of law pertaining to the subject which is consistent with the statute. The statute is to be considered as supplemented by the general law under which the primary and inalienable rights declared by the Constitution have always, from the beginning of society, been exercised.

That general law always has embraced and always will embrace, so long as free institutions shall endure,

the great instrument of civilization for dealing with property rights—the instrument of contract.

It is next in order to consider the general law upon the creation of easements.

## 2.

**A Servitude and the corresponding Easement can be created in no other way than by contract, express or implied, between the owner of the dominant and servient estates.**

He who undertakes to establish that a perpetual easement in water supply for irrigation cannot be created in California upon the principles of contract, undertakes a task the like of which has thus far never been accomplished either under the common law or the civil law. We think the present case is the first in which any court has advanced the conception that such property rights cannot be dealt with by contract between the respective owners, of the servient and dominant estates; and we venture to think that the decision stands unsupported by any court of last resort.

There is no dissent anywhere from the principle tersely stated in the Civil Code of this state as follows:

*"Sec. 804. A servitude can be created only by one who has a vested estate in the servient tenement."*

Or as stated in 10 Am. & Eng. Enc. of Law p. 409, 2nd Ed.

"Easements as a species of incorporeal hereditaments 'lie in grant,' and can be acquired only by 'grant, express or implied, or by prescription, which 'pre-supposes a grant to have existed.'"

2 Wash. Real Property (Marg. page) 27, 3rd Ed.  
p. 277.

*Gould on Waters*, Sec 299.

*Goddard on Easements*, going somewhat more into analysis, says (Bennett's Ed. p. 87), that easements may be acquired:

"1. Under a grant; 2, by virtue of an act of parliament; 3. Under a devise; 4. By prescription; 5. Under a custom; theoretically, it is a question whether all these modes of acquisition are not identical, that is, whether the acquisition does not in each case take effect from a grant by the servient owner, either express or implied; and, in support of this theory it is to be remarked that Lord Cairns, L. J., in speaking of the power supposed by a railway company to have been given them by an act of parliament, to set out a foot-path over land they did not possess, said: (In *Rangely v. Midland Railway Co.*, L. R. 3 Ch. App. at 310, 37 L. J. Ch. 313) 'I will assume in the first place, that that is a correct expression, and that the object is to create what is properly termed an easement over the land; but assuming that to be so, it appears clear that to create an easement over land you must possess the ownership of the land. Every easement has its origin in a grant express or implied. The person who can make that grant must be the owner of the land. A railway company cannot grant an easement over the land of another person. They may grant an easement as soon as they become proprietors of the land, but not until they become such proprietors. They must own the servient tenement in order to give an easement over the servient tenement.' Even though, therefore a right of way or other easement were conferred under the provisions of an act of parliament, it is questionable whether it is not in the eye of the law created and given by an implied grant by the servient owner.'

The discussion by Lord Cairns in the case above referred to, is relevant to the inquiry as to the genesis of the perpetual easements declared by Sec. 552. If an act of the Supreme Parliament did not suffice to confer upon the railway company the right of opening the footpath over land not owned by it, much less, in view of the limitations in our Constitutions, could an act of the Legislature by its unaided force take away an interest in the property of the corporation and confer it in form of a perpetual easement, upon the land owner.

There is then something more in Sec. 552, than a naked legislative fiat. We conceive that the true origin of the easements declared in it, lies in the consensual acts of the parties. What are they? There is, in this case, as already pointed out, first the appropriation, that is, as judicially interpreted (112 Cal. 433 *supra*), the devotion by the corporation of its water system, to sale, rental or distribution of water. Such a devotion is simply a public offer; when it is accepted by the land owner and the water has been applied to his land, a property relation has grown up, which is based on acts which are, and by the statute are treated, as evidence of mutual consent.

The law thereupon seizes upon what the parties have thus done, and declares that the easement may be perpetual, on condition, however, that proper compensation is made to the corporation. So that under Sec. 552 we still have the principle that the easement proceeds from the owner by his voluntary act ac-

cepted and utilized by the land owner, to which the statute imputes the effect of a grant. It is to be observed that the statute proceeds no further than to declare the perpetual easements based upon what the parties *are engaged* in doing, or *what they have done* by the way of furnishing and receiving water to irrigate land.

Of true grants of easements by statute, the acts of Congress and the laws of the States, relating to appropriation of water, are examples; but it is remembered that such grants are respectively servitudes upon the public lands of the United States and the States, and are therefore made by the owners. The grants of easements contemplated by Sec. 522 proceed then *not from the state*, but from the corporations *which own the systems*.

There is no possible mode by which such a servitude can be created upon private property and annexed to private property, but by the act or acquiescence of the owner of the water system, and the co-operation of the land owner.

*Thorn v. Sweeney* 12 Nev. 251, 256.

*McGregor v. Silver King Mining Co.* 14 Utah 47, 45  
Pac. Rep. 1091, 1092.

The relation is therefore necessarily contractual.

There is then an obvious incongruity involved in the judicial admission, that each of these appellants

has acquired the right to the continuous use of water from this system "*as a perpetual easement to his land*", and as a right already vested, (76 Fed. R. 334), and the decision, that all the allegations that such acquisitions were under contracts express or implied, must be expunged from the answer as irrelevant and impertinent. For if an easement must take its origin in an express or implied grant or in prescription, how can there be eliminated the element of contract or assent in its creation?

There are but two suggestions advanced in the opinion of the court below in support of its position that an irrigation servitude cannot be created by the contracts and the acts of the parties as alleged in the bill and answer.

The first is express, that inasmuch as the company could not have compelled the appellants *to buy* their easements, as a condition to being furnished with the water, therefore the parties could not freely and voluntarily make contracts with each other for the creation of such easements. The inconsequence of this conclusion, has already been referred to, and needs but to be stated.

The second suggestion is necessarily involved in the absolute and unqualified holding by the court, that no attempt to establish by private contract *rates or compensation* for furnishing water is of any validity.

Since any contract for the creation of an easement

would necessarily deal with the rates or compensation to be paid therefor, either by way of a lump sum, or annual rates, or both, the creation of the easement by contract would, if permitted, necessarily be inconsistent with the supposed exclusive "power of the State to fix and regulate the rates" to cover both net revenue and maintenance.

It is evident that if it is lawful for such a company to sell and for a land owner to buy, an allodial easement, the grant thereof on payment of the *full* agreed purchase price therefor, or waiver of any price, would *ipso facto*, forever eliminate from the relation between the servient and dominant owners, all rates to yield "net annual receipts and profits"; and would leave nothing to be met by the rates, but the "annual reasonable expenses" of repairs, management and operation.

So either the theory of the *exclusiveness* of the power of the State to fix and regulate rates and compensation must go; or, if it stays, the power to create easements by contract must go. Such an exclusive public power as that asserted by the court, will bear no rival near the throne.

It will not endure the suggestion that the power of the State to regulate may be only suppletory to the power of the parties to contract, and that it is useful only where they fail to agree.

The discussion therefore next addresses itself to the

question whether the statutes do forbid any contracts express or implied relating to rates or rentals.

3.

**In contemplation of the statutes all actual rates for the enjoyment of irrigation easements are established upon the principles of contract; and they are not established by the water corporations acting as political superiors—nor is the Board of Supervisors empowered to fix absolute or minimum rates.**

The statute of March 12, 1885, is the law which defines the authority of the Board of Supervisors to fix and regulate irrigation and other rates outside of cities; the Board is not authorized or required to act except on a prescribed petition of not less than 25 inhabitants who are taxpayers (Sec. 3.) When it is so called upon to act, it can only fix *maximum* rates (Sec. 2); that is the Board is authorized only to announce a limit beyond which the company cannot go. Therefore an attempt by the Board to fix absolute and minimum rates, that is the actual rates, would be illegal. This was so stated in *Wheeler v. Northern Colo. Irrigating Co.* 17 Pac. R. 487, 492, under Sec. 8 of Art. XIV of the Constitution of Colorado, which makes it the duty of the general assembly to provide by law that the Boards of County Commissioners in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations.

Two things follow from the legislation:

*First:* That there is absolutely no limitation in the statute, even after the Board has acted, upon the power of the corporation to agree with any consumer for any rate *within* the maximum fixed by the Board. This Court in *Lake Shore & M. S. R. Co. v. Smith* 173 U. S. 684, 691, speaking of the exercise of the power to fix by statute maximum rates for railroad companies, said:

**"It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such manner as may seem to it best suited for its prosperity and success."**

And where, when the Board acts, there is a pre-existing agreed rate, below the maximum fixed by the Board, that maximum does not disturb any such rate. The assumption that where the Board fixes a maximum higher than a rate previously agreed upon for an existing easement, this authorizes the corporation to increase the rate as against such easement to the maximum, would really and in effect, convert that into a minimum and absolute rate which the law intends to be only a maximum rate. This result is precisely what this decree would accomplish. It grants to the corporation and its receiver the demanded increase until the Board shall act; if the Board should, upon a lawful petition, fix a rate say of \$5.00, is it not apparent that if such rate can affect vested easements, it would prove the minimum and absolute rate—as certainly as that a corporation that wants to increase the \$3.50

rate to \$7.00 will exact a \$5.00 rate, if it can get no more?

The whole assumption that the function of public regulation is to supersede contracts, is based on the fallacy that rates when so established are absolute and hard-and-fast, instead of being a mere maximum limitation beyond which in contracting the consumer is not bound to go.

Only the parties interested can by their agreements express or tacit, fix an absolute and minimum or actual rate; for certainly that power is not given to any public body.

*Second.* The law by its terms, contemplates that irrigation water rights may vest under the system of any corporation subject to public regulation and control, before that power is exercised through the Board of Supervisors, and while *that method* of its exercise is in abeyance.

Now if the parties can make a contract for rates within the maximum, where that has been established by the Board, where is there any reason for saying that the parties can make no agreement, where the Board has established no maximum?

In the case here before the court the action of the Board of Supervisors had never been invoked, although the water system had been in operation over eight years, during which all of the admitted easements of the defendants had vested.

Reserving the act of 1897 for later consideration, we seek to bring together, in proper sequence, condensed, as it were, in codified form, the whole prior and co-existing statutory law, relating to establishment of rates for enjoyment of irrigation easements, in the case where the Board of Supervisors has not acted, as follows:

- (1. From Act of 1862). Every company shall have power and the same is hereby granted to establish, collect and receive rates, water rents or tolls, which shall be subject to regulation by the Board of Supervisors of the county in which the work is situated.
- (2. From Act of 1876 Sec. 552 Civil Code). Whenever any corporation has been or is furnishing water to irrigate lands, the right to the flow and use of said water is and shall remain a perpetual easement to the land, at such rates and terms as may be established by said corporation in pursuance of law.
- (3. From Sec 5 of the Act of 1885). And until such rates shall be so established (i. e. by the Board), or after they shall have been abrogated by such Board of Supervisors as in this Act provided, *the actual rates established and collected by each of the... corporations now furnishing or that shall hereafter furnish appropriated water for sale or rental to the inhabitants of any of the counties of this state, shall be deemed and accepted as the legally established rate thereof.*

(4. From Sec. 8 of the Act of 1885). Any and all corporations, furnishing for sale or rental any appropriated waters to the inhabitants of any county or counties in the state.. shall so sell or rent.. such waters at rates *not exceeding* the established rates *as fixed and established by such corporation as provided in this Act.*

These provisions are all in *pari materia*, and so considered, their total and aggregate import is as follows:

The Act of 1862 grants to the corporation the substantive franchise to establish, collect and receive rates and water rents; the act of 1876 (Sec. 552 Civil Code) declares the perpetual irrigation easements *at* the rates and terms lawfully established by the corporation; the Act of 1885, Sec. 5, clothes the "*actual rates established and collected*" by the corporation with the binding obligation of express law, not only until the Board has fixed rates, but after such Board shall have abrogated, in the manner provided in the Act, the rates fixed by it in accordance with the Act.

And finally Sec. 8 of the Act of 1885 provides that the corporation *furnishing* the water for sale or rental, *shall* sell or rent at rates *not exceeding* the "*actual rates established and collected*" by it.

It seems to us that, while all these statutes aim at preserving to the corporations all proper freedom of action in their important functions of selling and renting the perpetual irrigation easements, and in originally establishing the compensation and rates therefor,

such statutes carry on their face the plain evidence of constant progression, toward making the vested rights of the irrigator to the use of the water more permanent, and his duty in respect of rendering rates and compensation more certain and fixed, as against encroachment by the corporation.

In view of Section 2 of Article XIV of the Constitution, which provides that the franchise to collect rates (the grant of which franchise, it will be noticed, dates from the Act of 1862), "cannot be exercised except by authority of and in the manner prescribed by law," we must conclude that the legislation, as it is made to stand after the Constitution was adopted, should not omit to keep the corporation under regulation and control of law, merely because the Board of Supervisors has not acted. If the Constitution is obeyed, we are not to expect an interregnum of legal control and regulation of the sale and rental of water, while the power of the Board of Supervisors in that behalf has not been called into exercise. It would be quite possible and it would conform to the Constitution, for the statute itself in the interval, to shield the irrigator in his vested rights against all arbitrary action by the corporation; such for example as doubling the rates at one jump and summarily shutting off the enjoyment of the easements to enforce payment of the increase. The statutes might accomplish this by declaring that the right once vested to the flow and use of the water is and shall remain a perpetual easement to the land at a standard of rates adopted by the stat-

ute; that standard might be, with the utmost propriety, the actual rates which the parties directly interested have voluntarily established between themselves by their express and implied contracts, their usage and custom, and which have for a long time been uniformly paid by the irrigators and collected and received by the company.

When we turn to the statute, if we find that these very things are there provided with emphasis and comprehensiveness, we need not be surprised; for the statute would simply manifest in this instance for these property relations which free agents in pursuit of lawful and necessary ends have constituted for themselves that same high regard, the leading instance of which in our paramount law, is the prohibition of the Constitution against the passing by any state of laws impairing the obligation of contracts.

But the original bill in this case is framed upon the assumption, and the court below decided, that these statutes mean that the corporation, in the absence of any action by the Board of Supervisors fixing maximum rates, had not only the power to establish the original rate at which irrigation easements must vest, if at all; but also that the corporation had power to abrogate the rate at which the easements in this case did vest, which is also the actual rate established and collected by the corporation; and, to make and enforce a new and increased rate against the will of the irrigators; also, that the contracts and representations of

that corporation could be no bar to the exercise of this power.

The very *crux* in this case is over the question of *power* in the corporation or its Receiver to abrogate rates once established and to make and enforce increased rates against the will of the irrigators. So the complainant treated the case in his acts anteceding the suit, and in his bill, and in his exceptions to the answer and in argument.

So also the court below treated the case, as centering in the naked question of such power, without regard to consequences to complainant or defendants—for it felt constrained not to go into the question of the reasonableness of the increase, as we have already dwelt upon.

As a question of such power under the statutes we are now to consider it.

There are but two methods in which anything having the force of law between two or more persons can become, to use the strong word employed in these statutes, *established*:

The one, is by the voluntary agreement or consent of equals. The other is by the command of a political superior.

The Federal and State Constitutions themselves are examples of the former. The preamble of the Constitution of the United States declares this in the language:

"We, the people of the United States, in order to "form a more perfect Union, establish justice . . . do "ordain and *establish* the Constitution of the United "States of America."

And it was provided in Article VII that:

"The ratification of the conventions of nine states "shall be sufficient for the establishment of this Con- "stitution between the states so ratifying the same."

So the preamble of the Constitution of the State of California reads:

"We, the people of the State of California . . . do "establish this Constitution."

And Section 7 of the schedule reads:

"Every citizen of the United States entitled by law "to vote . . . shall be entitled to vote for adoption or "rejection of this Constitution."

Thus the Federal and State fundamental laws became established upon the consent of political equals.

These are the highest examples of law coming into force by agreement or consent, transcending of course all others.

In another and important sense all lawful contracts between civil equals become a law between the parties, and the foundation of obligations which, under the paramount law even constitutions and legislative acts may not impair. So a treaty is a convention between political equals; but this does not prevent a treaty made under authority of the United States from

taking rank in the supreme law of the land. Const. Art. VI.

And as we shall point out further on, in case of a water supply which affects so many individuals in such a way, that it rises to the importance of a public use, contracts and consensual acts lead to a *status* as to rates, recognized and adopted by the statute as the law, obligatory not only between the corporation and the immediate persons who have entered into these contracts and co-operated in such consensual acts with it *in the past*; but also as an obligatory maximum standard between the corporation and others who may desire to acquire irrigation easements in the future, so long as no other limitation is set by public authority.

On the other hand, a high example of that which becomes established by a Political Superior, is the Circuit Court itself which rendered this decree, under Sec. 1 of Article III of the Constitution, it being one of such courts "as the Congress may from time to time establish". So also are post offices and post roads, power to establish which is given to Congress in Art. 1 Sec. 8 of the Constitution, examples of this method of establishing.

And a humbler instance of the establishment by a Political Superior of that which has the force of law, is the fixing of maximum rates, under the power of the State to regulate and control the rates and com-

pensation of water, delegated to and exercised by the Board of Supervisors.

Of course the conception of laws enacted by legislative bodies of all kinds representing political superiors, is as common as possible.

A primary difference between an obligation amounting to a rule of conduct created by agreement or consent of equals; and the obligation created by a political superior is this:

The former cannot be lawfully amended or changed by one party to the agreement, nor except by the common consent. To pursue the illustration already employed, this was the conception maintained by Webster concerning the Constitution, which declares itself the Supreme law; and it proved of prevailing moral and material force.

But the obligation of a rule of conduct established by the Political Superior may be abrogated or superseded at any time at the will of such Superior.

Now in this case, we are to assume to begin with, as is conceded on all hands, that the annual rate of \$3.50 per acre was the original rate established by the corporation pursuant to law when the easements of all the defendants vested under Sec. 552; and that it became the "actual rate established and collected by the corporation" which under Sec. 5 of the Act of 1885, was to be deemed and accepted as the legally established rate. And if legally established, then it was mutually

obligatory upon the corporation and irrigators, until suspended by competent authority, with due saving of vested rights.

If that rate became established by agreement and consent between the corporation and irrigators acting on a plane of civil equality, one party could not revoke it and supersede it by a higher rate *in invitum* the others; for it is only a rule of action established by a Political Superior that can be revoked and superseded in the sovereign discretion of such Superior, whether the subject is willing or unwilling.

Hence the importance of the inquiry as to whether the \$3.50 rate was contractual or established by the corporation acting as a political superior.

For if the former be true and the latter be not true, the corporation had no power to abrogate the \$3.50 rate and supersede it by the \$7.00 rate, and the decree must be reversed.

Looking at the matter in the light of general principles, it is evident that the law does not compel men to organize water corporations; nor, the corporations to build their systems; nor, to devote them to the sale, or rental of water. Neither in the absence of action by the proper Board of Supervisors, do the statutes limit the rates which the corporations (in the terms of the above extract from the opinion) "must designate", or "charge" *at the outset* of their business.

Nor, on the other hand, do the *statutes*, however much necessity may, compel any person to become a user of water for irrigation, at any rates, or upon any terms.

Therefore at the opening of its system to the public use, where, as here, no limitation of maximum rates has been set by the Board, the corporation may designate rates or charges for furnishing water for irrigation, at its own discretion. But the action is altogether barren of results until one or more persons, finding the rate, to use the court's phrase, "satisfactory", accept the use of the water at the rates or charges designated; and in such case of those terms the acceptance must be, if the water is to be supplied; for there is nothing else to accept; and payment is the condition to the supply. Until such acceptance, the corporation is at perfect liberty to promulgate or designate new rates daily, if it choose; there is nothing *established*.

But at the moment when one or more persons accept the use of the water at the rates and terms designated, *then* there comes into existence a property relation—the perpetual easement to the land—at the rates and terms so accepted.

Then for the first time, is there a rate *established*.

We are told by the Receiver in his bill of complaint, that his corporation originally set the irrigation rates at \$3.50 per acre, per annum, and charged that rate and no more to January 1, 1896. Who will say that when the defendants accepted the use of the water at

that rate, and entered upon the long, arduous and costly work of making the desert to blossom by that use, such rate did not become *established* by the corporation in the sense in which that term is used in the Act of 1862, in Sec. 552 of the Civil Code and in the Act of 1885—Sections 5, 8, 10?

But how was it established? We see that the law did not compel either party into the relation of dominant and servient owners; they assumed this relation voluntarily. If it be claimed that they did not, it is incumbent for him who so claims to point out what act, on either side, did not have its root and origin in the free will of the parties, and why it was not mutual consent which effected the enduring relation of servient and dominant estates?

We here take occasion to point out that from the sum total of such acts, arise *reciprocal servitudes* upon each estate. For not only are the rights to the flow and use of water to irrigate the lands of appellants, servitudes upon the water system of the corporation; but the right of taking rents for this easement is a servitude upon the land to which the easement is annexed. Civil Code, Sec. 802. Sub.-div. 4 is as follows:

"The following land burdens, or servitudes upon land, may be granted and held though not attached to land."

"4. The right of taking rent or tolls."

The statute of 1862, Sec. 3 (appendix) uses the terms "rates," "water rents" and "tolls" in relation to the distribution of waters and navigation of canals.

Under the general statute, the demand as of right, and the payment as a duty, for more than eight years of this annual rate of \$3.50 per acre, without more, became a servitude of rent on the lands of appellants by prescription, even though there had been nothing more of express agreement than such acts of demand and payment; that in such case it would have become established by prescription, even without the aid of the Sec. 552 and the Act of 1885, and under Sec. 1007, Civil Code, and 318, Code of Civil Procedure (appendix), is fully supported by the case of *Whittenton Manuf. Co. v. Staples*<sup>164 Mass. 319, 41 N. E. R. 441, 445-6.</sup>

That case, so far as this point was concerned, was a suit by the owner to collect one-fifth of the annual cost of maintaining a dam and drawing the water therefrom for the benefit of lower riparian premises, owned by another. The following extracts from the opinion will show the decision:

"No distinct agreement or stipulation being shown "calling for the payment of one-fifth of the cost of "maintaining the dam, we have to consider whether a "servitude has been imposed on the defendants' land "by prescription requiring such contribution \* \* \* \* "The one party collected the money as a right; the "other paid it as a duty."

Having shown that this continued for more than the length of time required to establish a prescription, in that State, the opinion continues:

"It would seem that the evidence is sufficient to establish such a servitude by prescription if in law such a servitude can be so created."

And after discussing authorities:

"So, where a reservoir dam is maintained for the benefit of several estates, the duty of repairs in whole, or in a specified proportion, may be established by prescription as a charge against one of the estates in interest. The duty of paying one-fifth of the reasonable compensation for drawing water rests on the same grounds."

But Sec. 552 in its specific declaration that the perpetual easements to the land irrigated is at such rates and terms as may be established, and Sec. 5 of the Act of 1885, that the actual rates established and collected shall be deemed and accepted as the legally established rates, virtually declare the servitude of rent within the meaning of Sec. 802 Sub.-div. 4 of the Code *supra*, to come into existence at once upon the concurrence of the acts of the parties defined in the section.

If these acts then by which such reciprocal servitudes were created were entirely voluntary, as is all but expressly admitted in the foregoing extract from the opinion of the court below, what is there in the opinion of the court to prove that both the servitudes, that of water, and that of rates, were not of consensual, and of mutually compensatory origin, but that they were the product of the fiat of law?

We have already commented on the fact that in order that such a rate may come into existence, there is

an absolute necessity not only that there be a corporation ready to furnish the water, but that there be land owners, either purchasers from the corporation or others ready to take it. At the opening of its system to use, the two must come together on some basis of compensation to be rendered to the corporation for the use of the water, and they must co-operate before there is any actual use of the water; and the user must pay the compensation before it can be collected; only then is there any actual rate established and collected.

The bill and answer in this case afford an excellent illustration of the history of communities in which just such an actual rate established and collected, came into existence—a typical instance—to every varied phase of which these statutes apply.

Here was a Kansas corporation which was both a land and water company, and which owned a large tract of arid lands well nigh worthless without irrigation; it planned an irrigation system with the primary object of making its lands salable as irrigated lands and with the more incidental purpose of getting additional revenue from the irrigation of other lands. Having built the system, and appropriated the only source of water supply for a considerable section of country, it came into control of a monopoly (the term is not used in any offensive, but purely descriptive sense) of the element by the use of which only, can the land be made tillable or habitable.

Before putting its lands on the market or throwing

its water system, which was completed in February, 1888, (Trans. 10) open to use, it considered in connection with that scheme, the question of the annual irrigation rates which it should charge, both to expected purchasers of its own lands and to owners of other lands. The Company knew, and must be considered to have known, all that could be known, about the cost of its system; it called into consultation, we are told by the bill (Trans. p. 10) its engineer, who gave it advice upon the probable "duty" and furnishing capacity of the system; and with all the information which it considered necessary, it did in the year 1887 set the irrigation rate of \$3.50 per acre, per annum, as the rate satisfactory to itself.

What course of action could be more natural or proper?

Contemporaneously, it put prices upon its lands as irrigated lands, ranging with the exception of half dozen five acre tracts to start with, from \$250 to \$500 per acre (Trans. p. 20) and advertised them for sale, representing that the water of its system was piped to and over its lands and would be supplied to purchasers thereof in abundance for irrigating the same at the rate of \$3.50 per acre, per annum. (Trans. p. 19.)

Up to this stage it will be observed the company acted with entire freedom and absence of restraint; it exercised the same actual volition in setting a rate upon its water, that it exercised in setting a price upon its lands as irrigated lands; and upon the same principle; indeed, it combined prices for the two in one.

In the absence of any maximum set by the Board it was supreme in the wilderness and desert which its system was later, with the co-operation of irrigators, to make fertile.

Presently, however, purchasers came for its lands, attracted by its representations, from every quarter of the Union, from Great Britain, Germany, Italy, Canada, Australia, New Zealand, Hawaii and elsewhere, and bought lands at these prices and accepted, and began using the water for irrigation at the \$3.50 annual acreage rate. Also owners of land not purchased of the company were, until December, 1892, invited to use and accepted and began using water at the same rate. These people could not know what the corporation knew about the basis of its rates. They could only know whether the rate was "satisfactory" and whether they were willing to buy and to improve land under those rates.

After December, 1892, the company adopted the policy of making express contracts for the sale of water rights both to purchasers of its own lands after that date, and to owners of other lands who began the use of water after that date, under the form of an express grant of one-acre foot per acre, each year, delivered on the land, for a specified lump price, first at \$50 and later at \$100 per acre (Trans. pp. 20, 21), and still subject to the same actual annual rate of \$3.50 per acre.

And a considerable number of the defendants bought water rights on these terms and entered upon the use of their easements paying the \$3.50 rate.

In June, 1895, the corporation established a rule of classification of lands to take effect January 1, 1896, (Trans. p. 24), for the purpose of fixing rates for irrigating acre property, and thereby distinguished lands to which the easement and flow of water for irrigation had been annexed by the consent or voluntary act of the company from lands to which it should not be annexed by such consent or voluntary act of the company, denominating the former as lands of the first, and the latter as lands of the second-class. And as to the second-class, it promulgated that in addition to the annual rate charged equally upon both classes, there should be paid upon lands of such second class an annual charge of 6 per centum upon the value of the irrigation easement to be taken at \$100 per acre.

All the lands of the defendants fall within the first-class, and there is not, and never has been, any question between the company and the defendants that they are in fact, and always have been on the same footing as to annual rates, and that they have been always so treated by the company.

There are no persons who would be classed as owners of lands of the second-class before the court.

All these defendants, whose lands were thus classi-

fied, paid the annual rate of \$3.50, and no other, up to January 1, 1896, within five days after which, and prior to, the time when any further rates could become delinquent under the rules adopted by the company (Trans. folio 50), this suit was brought.

Why was this rate not in its very nature and origin contractual, and for that very reason, the Board of Supervisors, having set no limits, the rate established by the corporation in pursuance of law, within the meaning of Section 552 of the Civil Code?

Suppose all this history had occurred in 1878, instead of from 1888 on, and therefore prior to the Constitution of 1879, and the act of 1885, what would be the answer of this question?

The answer must have been that the rate came about by the express or implied contracts of the parties, or the usage and custom followed by them. What other answer could be made?

But since the Sec. 552 has been held to be consistent with the Constitution, the answer must be the same now as it would have been then in the case supposed.

As already pointed out, this Sec. 552, covers every phase of the creation of these easements as shown in their history set forth in the answer and as summarized above, whether the corporation furnished the water to lands sold by it or to other lands. This section speaks of perpetual easements to the lands, at not only

such *rates*, but such *terms*, as may be established by the corporation.

The word "terms", as distinguished from "rates", is quite competent to cover the demand, or the dispensing with the demand, of a lump sum as the price of the easement, in connection with the annual rate. This word "terms" then in this section is a word of contract and covers the cases where the freehold easements were sold with the land and their price was included with the price of the land, whether under implied or express grants; where the easements were annexed without demand of any price to other non-company lands; and where it was annexed to still other such lands at the price of \$50 and later \$100 per acre. But the rate of \$3.50 was uniform, however the terms of sale, or annexation otherwise, of the easements varied. So that Sec. 552 covers every instance.

Now the "terms" at which these easements vested were contemporaneous and concomitant with the vesting; they were then set by the corporation and accepted by the irrigator; they became determined and perpetually fixed by the agreements, or acts of the parties at that time.

But the word "rates" is used in full conjunction with the word "terms" in the phrase "*at the rates and terms* which may be established by the corporation in pursuance of law". Since the language means at the *terms* established at the time of vesting, so it also means at the *rates* established at the same time; the maxim of

interpretation *noscitur a sociis*, applies. Therefore, under the facts in this case, each of these easements, in the emphatic language of the section, "*is and shall remain*" a perpetual easement to the land *at the rates and terms established at the time when these easements vested*, that is at the rate of \$3.50 per acre, per annum, and at the terms as to price then demanded or waived.

What meaning (as bearing on annual rates) is to be given to the phrase "*in pursuance of law*", as used in Sec. 552?

It meant but one thing when it was enacted—it means the same thing now; and that meaning was and is, that the corporation in respect of annual rates can never exceed the maximum established by law. As already pointed out, the Act of 1862 provided for regulation of rates by the Board of Supervisors; the Act of 1885 elaborates the law in this respect, confines the power to limiting maximums, and provides a method of procedure. But as before suggested, it also takes care that there is no *hiatus* in the legal regulation and control, simply because the Board has not acted. Were it otherwise it would not be obedient to Sec. 2 of the Article XIV.

It is apparent that the temptation to corporations, especially foreign, is strong, to increase water rates as against irrigators who, having confided in the promises and representations of the corporation respecting

the cost of water, have been induced to render themselves in house and field, dependent upon the supply.

One who is still free and unattached, and merely desires to share in the supply devoted to the public use, needs and receives, the aid of the law to obtain the use and to limit the rates within a maximum established by public authority (Act 1885, Sec. 10).

Much more ought those who have given hostages, in reliance upon rates and terms offered and accepted, for what the law assures them, shall remain perpetual easements, by investing, as in most cases, their all in a home under a water system, to be protected against any arbitrary advance in rates by the owner of the servient estate. Surely it is not to be supposed that the law is so defective as to have merely provided for a legally established maximum rate at the time of investment, but not afterward, except after the Board acts.

In addition to the considerations derived from Sec. 552, in favor of fixedness and permanency of the rate because it is contractual, we are now to consider what the Act of 1885 has provided in that behalf for the further peace and security of the irrigator against encroachment by the corporation.

Thus far everything done between the parties is entirely explainable upon the principles of contract; and unless by some over-ruling provisions of the Constitution and statute, it is made to appear that what

seems to have been done contractually, was in fact constituted by the corporation as the law-maker, we must conclude that the original rate of \$3.50 was contractual. This leads to the examination of the specific question whether what is ~~en~~<sup>in</sup> dominated by Sec. 5 of the statute of 1885 as "*the actual rate established and collected by the corporation*" is contractual, or established by the corporation as exercising governmental power, and therefore repealable by it in the continued exercise of the like power?

But before taking up that head we call attention to a number of cases in which contracts respecting water rights and rates between water corporations and irrigators have been enforced. While it is true in most of these cases, that the power to make such contracts was not directly in question, it is incredible that courts should have gone on year after year in an unconscious assumption that contracts were lawful, if, as is now claimed, they were in conflict with public policy.

*Fresno Canal & Irrigation Co. v. Rowell* 80 Cal. 114; *Same v. Dunbar* 80 Cal. 530; *San Diego Flume Co. v. Chase* 87 Cal. 561; *Clyne v. Benicia Water Co.* 100 Cal. 310; *Balfour v. Fresno C. & I. Co.* 109 Cal. 221; *Hewitt v. San Jacinto & P. v. Irr. Dist.* 56 Pac. Rep. 893 (April, 1899).

The comment upon some of these cases in *San Diego Flume Co. v. Souther* 90 Fed. Rep. 164, 168-9, we submit is reasonable and just. A re-hearing was

granted, however, in that case upon the very question here under discussion, and is now pending.

The cases which we are about to cite from Colorado are of special significance in view of the constitutional provisions in that state of which it is necessary to quote the following only, to illustrate what is now under discussion.

*Constitution Art XIV.*

"Sec. 5. The water of every natural stream, not heretofore appropriated, within the State of Colorado, *is hereby declared to be the property of the public*, and the same is hereby dedicated to the use of the people of the State, subject to appropriation as hereinafter provided.

"Sec. 8. The general assembly shall provide by law that the Board of County Commissioners, in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations."

While our Constitution contents itself with declaring that the use of water dedicated or devoted to sale, rental or distribution, is a *public use*, the Constitution of Colorado declares that the water of every natural stream (saving vested appropriations) *is the property of the public*, and dedicated to the use of the people. This declaration abolishes riparian rights and does not wait for any corporation, or individual, to devote water to sale rental or distribution, before declaring the public use, but declares all unappropriated waters *the property of the public*.

But has it been found necessary or possible for the courts of Colorado to declare that there can be no private property rights derived under such public ownership, nor any contract relations between water corporations and irrigators, but that the whole relation is absolutely dominated by public authority to the exclusion of every ordinary conception of private property rights, in water for irrigation, acquired under some form of contract? We think there is no suggestion of such a heresy in any reported decision.

The case of *Wheeler v. Irrigation Co.* 17 Pac. Rep. 487, 10 Colo. 582, is the first of the series which deal with the relations of water companies and consumers in that state under its Constitution. The court referred to this in the following language:

"The subject of water rights has always been justly regarded as one of the most important dealt with in "in the legislation and jurisprudence of Colorado. "Hitherto attention has been mainly directed to the "adjustment of priorities and differences between in- "dividual consumers; but hereafter owing to the rapid "settlement of the eastern part of the state, the status "of the carrier and its relations with the consumer, "will command the most earnest and thoughtful con- "sideration."

This case has already been referred to in connection with the highly necessary and proper doctrine that no water company can as a condition precedent to supplying water, compel an unwilling person to buy a water right. But the court did not conceive that this excluded the right to make voluntary contracts. It used this language (17 Pac. Rep. 493):

"But no expenditure, however vast, and no inconvenience, however great, can justify or legalize the exaction, *the consumer objecting*, of the demand under consideration, as an absolute condition precedent to use for the current irrigating season. I must not be understood as intimating the demand is illegal *per se* and if the consumer, prior to 1887, saw fit to waive his right, by voluntarily submitting thereto, both the legislature and courts may alike be powerless to relieve him from the legitimate results of his contract."

In *South Boulder & R. C. Ditch Co. v. Marfell* 25 Pac. 504, 506, it was said in the opinion of the court:

*"Nor does the action of the commissioners in pursuance of the statute prevent consumers from making special contracts regarding the rate, or from continuing under agreements already existing."*

In no subsequent case is anything held in conflict with this.

In *Wyatt v. Larimer & Weld Irr. Co.* 33 Pac. Rep. 144, cited in division III of this brief, it was said in the opinion at p. 147:

"The right to the relief demanded in this action is predicated upon, and must be determined by, the terms of the contracts entered into between the respective parties; and while these contractual rights are analogous to the rights guaranteed by the Constitution to appropriators of water, the action involves only the construction of private contracts between the ditch company and the plaintiffs, and no constitutional question is involved in the case. . . . ."

"The rights of the respective parties are, therefore, to be measured and determined by the construction of the contracts in question; and the controversy, as above stated, involves only their contractual rights. The status of the defendant company, could in no re-

"spect affect these rights. Its duty to the plaintiffs "would be the same whether that duty was to furnish "water under their contract *as proprietor or carrier of water.*"

As pointed out in the earlier part of this brief, the contract of the corporation (*ibid* 145) was one "whreby it agreed perpetually during the irrigating seasons, to deliver water to the said parties"; and it was held that such contracts created freehold estates, which were entitled to protection against diminution by sale of later water rights in violation of the contracts.

And in *Larimer & Weld Irr. Co. v. Wyatt* 48 Pac. Rep. 528, 532, it was held that the contracts between the water corporations and consumers "provided for prorating water in times of scarcity and are binding between the parties"; and the contracts were otherwise enforced upon the principles laid down in *Wyatt v. Irrigation Co. supra.*

So in *Chicoso Irrigating Ditch Co. v. El Moro Ditch Co.* 50 Pac. Rep. 731, already cited, it was said of what was held to be a continuing easement that :

"The water was carried in a way recognized by our "statutes, obtained it is true by contract, but a right "which might have been acquired by legal proceeding."

See also *La Junta & Larimer Canal Co. v. Hess* 42 Pac. Rep. 50, 53; *Leadville Water Co. v. City of Leadville* 45 Pac. Rep. 362, 365.

*People v. Farmers' Highline Canal, etc., Co.* 54 Pac. Rep. 626 (1898), is a case which throws into strong relief the position that a contract between irrigators and a ditch company which was a *quasi* public corporation, to furnish water, is not opposed to the policy of the law which makes these corporations subject to public regulation and control. The court, after reviewing the cases in which it was held in that state that mandamus will lie to compel the delivery of water where there exists a correlative duty and right between a ditch company and irrigator, say (*ibid* 630):

"While the right recognized in these cases was *one* "conferred by statute, which the relator upon the performance of certain conditions, was entitled to enjoy, "we are unable to perceive any reason why the same right, "when conferred by contract, is not equally susceptible of enforcement in this manner, when clearly established "as in this case, and the consequence of its denial is "the same."

It will be observed that this decision differs in *toto cœlo* from that in the case at bar; for there the corporation was compelled by mandamus to keep its contract as a public duty; here the corporation is sustained in violating its contracts as a matter of public privilege.

From the State of Oregon we cite the following:

In *Nevada Ditch Co. v. Bennett* 45 Pac. Rep. 472, 482, the Supreme Court of Oregon per Wolverton J., speaking of a diversion and appropriation of water for actual use by others than the appropriator, said of such an appropriation:

"We are of the opinion, however, that it is the subject of contract between the person who initiates the appropriation, and the user. Nor is such a rule consistent or congenial with the creation and fostering of monopolies in the use of waters of public streams. The appropriator cannot withhold the water from a beneficial use. He must be diligent in making the diversion, or else he loses his inceptive right, and reasonably expeditious in making the application to a beneficial use, otherwise his appropriation will be measured by the quantity actually used; and he must not cease to use the water appropriated, upon pain of suffering an abandonment. And going with all this is the primordial condition that when not using he must suffer others to use."

Submitting these decisions we pass on to consider Secs. 5 and 8 of the Act of 1885.

## 4.

**Until the Board of Supervisors fixes maximum rates, the statute itself fixes the standard of maximum rates, as being the "actual rates established and collected by the corporation," and forbids the corporation to exceed such maximum.**

The statutory provisions immediately bearing upon this subject, are contained in Sections 5 and 8 of the Act of 1885, and were stated in the early part of sub-heading 3, of the present division (5) of this brief.

It is of prime and decisive importance to gain a full comprehension of the legislative generalization embodied in the phrase employed in the section 5, to-wit: "*The Actual Rates Established and Collected*", based as it is and must be on existing and historical facts.

We are to observe how in this case this "actual rate established and collected", came into existence; to what permanent institution of property it relates; upon what basis of principle it rests—why it is given by the statute an enduring quality; and how it harmonizes with the individual property rights in the perpetual easements to which it is connate and complementary, and how it quadrates with the just rights of the corporation.

Also we are to inquire, whether the declaration that this rate shall be deemed and accepted as the legally established rate of the company, is not in itself the *control and regulation* of the franchise to collect rates and compensation, which the Constitution enjoins shall be prescribed by law, and a mandatory limitation upon the power of the corporation over rates.

As we understand the contention for the complainant to the original bill, and the decision of the court below, this statutory phrase was construed, and as so construed enforced, to mean at the most—and as fairly as we know how to state it—substantially this:

*"Such rates as shall from time to time be generally and uniformly demanded by the corporation."*

This construction precisely covers the demand for the \$7 rate per acre, per annum, to enforce collection of which, in the round-about way of enjoining the defendants from resisting by legal methods the shutting off of their water supply, the original suit was brought.

It will be observed that, if this construction be cor-

rect, it follows at once, that under Sec. 5 of the Act, every successive demand by the corporation of an increase of rate, provided only it is general and uniform, becomes immediately by virtue of the demand and that alone, what shall be deemed and accepted as the legally established rates thereof.

As such legally established rate did the court sustain and enforce by its decree, the increase of the rate from \$3.50 to \$7 per acre, per annum. This involved the repeal of the former legally established rate and the superseding of it by a new rate, double the old.

It is evident that to maintain this position, it was a vehement necessity to call in the doctrine that the corporation was the Political Superior of the irrigators; for only thus could the corporation repeal at its own pleasure *one* legally established rate, and assume to establish *another*.

Only on that theory could the Constitution be reversed so as to be made to confer upon the corporation the pleasing, but arduous, role of regulating and controlling the irrigators in the name of the State; for this, and not the regulation and control of the franchise of the corporation by law, is the net result of the construction placed by the decision in this case, on the provision of the Constitution which declares the public use subject to the regulation and control of the State.

But there are certain difficulties attending this construction, which makes the statutory entity viz: "The actual rate established and collected" mean "such rates as shall from time to time be generally and uniformly demanded by the corporation".

Contrasting the \$3.50 with the \$7.00 rate, there are to be marked the following points of difference between them.

1st. The former was *actual*, in the sense that it was practically lived up to by all the parties concerned when the bill was filed, and had been, for eight years previously; but the latter had never been actual, it never had been in practical operation.

To borrow the language of a learned Judge of the Superior Court of this County, in a judicial opinion:

"One of the ordinary meanings of the word 'actual' is 'existing at the time;' as for example, the actual situation of the country; the actual condition of the treasury; the actual state of the weather. It is used "to express an existing state, situation, or condition " of either person or thing. The actual rates are the "existing rates established and collected by the company, which must be accepted as the legally established rates, until different rates have been fixed by "the Board of Supervisors."

It is apparent that the \$3.50 rate filled this obviously correct definition; and that the demand for the \$7 rate did not.

2nd. The former rate was being collected and had been continuously collected for the whole period the

water system had been in operation, three years longer than the time necessary to establish the mutual servitudes of water and rent by prescription; and since collected, paid; and since paid, acquiesced in.

But the latter rate had never been collected. The whole burden of the original bill of complaint, is that the Receiver has not been able to collect the proposed rate, and fears he never will, unless the court aid him by its decree and injunction.

3rd. The former rate was established by the corporation in pursuance of law. The latter was never established by the corporation; it was in fact established by the judicial power exercised in the decree here appealed from, and not otherwise, nor until then.

The former rate was established by the mutual consent and co-operation, as we have shown, of the corporation and the whole community of irrigators; by contract and custom and usage for many years it became a fundamental term of the relation between the dominant and servient estates; it entered into the value of every tract of land; it was deemed and accepted as the legally established rate by all concerned. The latter was a pure edict of the corporation which it sought to force upon an unwilling community by the most drastic measures.

If the lexicographer be consulted to define the word *establish* he will give its meaning substantially as does the Century Dictionary to be:

"To make stable, firm or sure; appoint; ordain; "settle or fix unalterably."

Surely the law has not committed to the corporation Alladin's lamp, so that a rub and a wish forthwith *establishes* the object of its desire.

We have already cited by way of illustration of the term, the establishment of constitutions by consent. We may borrow, without irreverence, a further illustration of the meaning of the word, often found in standard dictionaries:

"I will establish my covenant with him for an ever-lasting covenant. Gen. XVII-19."

There is no merit in the position that rates cannot become established by contract or consent. The method by which this \$3.50 rate became the legally established rate, was the declaration of the statute adopting as a rule of law a rate which had become actual between the corporation and the community, collected by the one and paid by the members of the other, pursuant to express or tacit agreements between them, or as in this case, by both express and tacit agreements. The statute adopted the usage, custom and practice which became established both by the express and tacit agreements for identically the one rate.

If we mistake not, we shall find that the Legislature of this State, in the enactment now under consideration, but followed the wise and statesman-like precedent of the Congress, when by the Act of 1866,

(Rev. Stat. Sec. 2339.) it provided that water rights which had vested and accrued, and which are recognized and acknowledged by the *local customs*, should be *maintained* and *protected*.

The facts in this case make an excellent illustration of the following passage from Austin's Jurisprudence by Campbell (Holt & Co. Edn.) p. 19:

"At its origin, a custom is a rule of conduct which "the governed observe spontaneously, or not in pursuance of a law set by a political superior. *The custom* is transmuted into positive law when it is adopted "as such, either *by being expressly embodied in statutes* "promulgated by the sovereign authority, or implicitly by the decisions of the courts of justice which are "enforced by the power of the state."

Force and effect must be given to the words "actual" and "collected" in the statute, as also to the word "established."

The words "actual," and "collected" and "established," as applied to the term "rate", take it beyond the mere promulgation, proposal or demand of a rate; these words imply the assent and co-operation of one or more persons who apply the water to land; thus, and thus only, can the rate become an actual demand which is collectible from any person or persons; when the rate has thus become actual and is habitually paid and collected, it becomes customary and established by usage; and the statute clothes this usage or custom with the express sanction of law. What is important to observe is that the usage or custom becomes the

law and that the law does not make the usage or custom. As Austin says, it is observed "spontaneously"; because no man can be compelled by law to use the water for irrigation and bring himself under the express or implied obligation to pay the rates; the obligation is voluntary, as much so as the devotion of the system by the company to sale, or rental of water, and its original setting of the rate was voluntary; and the mutual obligations are in fact contractual.

It is important to a true construction of the statute, to observe that it not only sanctions the rate which has thus become established and collected in actual practice as between the company and those who have acquired their easements at the rate *in the past*; but it declares that the same rate shall be deemed and accepted as the legally established rate in future cases of the creation of easements—that is as between the company and those who have not yet acquired, but only desire to acquire, easements to their land. (Act of 1885, Sec. 10.)

This suggests that the true field of the jurisdiction of the Board, so far as rates for net revenue are concerned, may be confined, to use the language of the Act of 1885, Sec. 6, to such appropriated waters as *are still subject* to such regulation by the Board; i. e. to cases where there is still remaining a supply of water not appropriated to prior easements and there is a dispute between those who desire to acquire new easements, and the company, over the justice or reasonableness of the actual rate established and collected

from the existing consumers; this view is strengthened by the fact that the petition to the Board for fixing rates is required to be signed by inhabitants and taxpayers and not by consumers as such; and by the leading consideration that vested interests in easements must be respected and that the burden of rates for their enjoyment cannot be increased *in invitum* to enhance the profits of the corporation. This question does not, however, arise directly upon the facts of this case, and reference to it is merely *in arguendo*.

But not only is this "actual rate established and collected" to "be deemed and accepted as the legally established rate thereof," i. e. of the corporation, *until* the Board fixes maximum rates; but the statute expressly declares, that *after* the Board has *abrogated* the rates it has established, which it may do "upon petition of such inhabitants, but not otherwise," (Sec. 6), the actual rate established and collected shall again "be deemed and accepted as the legally established rate."

This actual rate established and collected by this corporation for furnishing water, as it is shown upon this record, is then of such enduring virtue, that even after the Board of Supervisors has fixed maximum rates, such rate is only suspended as to any excess above the maximum( but whether only as to future and not as to vested easements, we do not now stop to inquire, since the question does not arise in this case).

And when the Board abrogates its maximum rates, this same "actual rate established and collected" by the corporation, revives in full force, and again "shall be deemed and accepted as the legally established rate thereof."

This "actual rate established and collected" by the corporation is then a fundamental entity—it becomes in the legislative conception, as it were, the common law of the water system, in supreme force as a limitation, when there is no special limitation of maximum rates, fixed by the Board of Supervisors; and only modified when there is such a special limitation in force; and surviving the special limitation after it is abrogated.

In every point of view the \$3.50 rate was actual; it was established; it was collected; but the \$7.00 rate was *not* actual; it was *not* established; it was *not* collected.

And the fundamental difference between them is that the former rate was the subject of the express and tacit consent, of contracts, some express and others implied, but contracts still; and the latter rate was not; but the corporation attempting to act as a Political Superior, sought to impose the latter as the rate by its sovereign command, maugre its every contract and representation.

The former rate came into existence by consent; it relates to a permanent institution of property; it rests

upon the principle of contract; it is in harmony with the individual property rights in easements; and since the corporation itself initiated the first step toward its establishment by setting it, it accords with all just rights of the corporation; and finally, it is the maximum rate which the statute itself in obedience to the Constitution adopted by way of the control and regulation of the franchise of the corporation to collect rates or compensation, inasmuch as the Board of Supervisors had not been called into action.

But the latter rate fulfills not one of these requirements, but assumes and asserts that until the Board acts, the corporation is under no control or regulation by the Constitution or laws, but is above the Constitution and the statute, and makes its own laws, and is free to break all its contracts.

4. But further considerations bearing upon this death-grapple between these two conflicting rates, arise out of the provisions of Section 8 of the Act of 1885.

The substance of this section, so far as applicable, is an explicit command to the corporation which *is furnishing* this water, that it shall so sell or rent such waters "*at rates not exceeding the established rates . . . as fixed and established by such corporation as provided in this Act.*"

The appellants respectfully and earnestly submit, that this is a command to the corporation to continue

furnishing the water under the easements of the defendants, at the "actual rate established and collected by the corporation," which "shall be deemed and accepted as the legally established rates thereof" (Sec. 5); and that it is in fact a command to the corporation, to accept the \$3.50 rate, and to continue to furnish such water **at not to exceed** that rate; and that this was just as much so, after January 1, 1896, as it was for the eight years immediately preceding that date.

But the corporation refused to accept that rate, and to continue to furnish at not exceeding that rate.

It interpreted this statute to be a command to it, to accept and to continue to furnish *at rates not exceeding such rates as it should from time to time demand*; and since at this particular time its demand was \$7.00, that that was the rate it was commanded to accept.

In short, the statute—according to that construction—means that the corporation shall at no time take any higher rates than it wants at the time; that it shall always accept such rates as it wants, only so that it wants them from everybody; and that what the corporation wants shall as against the vested easements, have the force of law.

*In Interstate Commerce Commission v. Railway Co.*  
167 U. S. 479, 505, this court used the following language:

"Could anything be more absurd than to ask a judgment of the court in a mandamus proceeding 'that the defendant comply with a certain order unless it elects not to do so'?"

So here we make bold to say:

Could anything be more absurd than a construction which makes this mandatory statute mean, that the corporation shall not exceed the established rate of \$3.50 per acre, per annum—unless it elects to do so?

The two statutes—Section 552 of the Civil Code and the Act of 1885, Secs. 5 and 8—read together and applied to the facts of this case, do in terms declare, directly, specifically and emphatically, that the flow and use of the water which has been furnished to the land of each defendant, is and shall remain, a perpetual easement at the rate of \$3.50 per acre, per annum, as the actual rate established and collected by the corporation, which shall be deemed and accepted as the legally established rate thereof; and that the corporation shall continue to furnish the water at not to exceed that rate as so declared legally established.

But despite these statutes, it seems to be assumed in the opinion, that the law must contemplate that the corporation shall have the right, even as against vested easements, to change the rates established by its own initiation, at which such easements vested, and which the statute has adopted as the maximum, precisely *because* the statute denies to it the right to initiate any proceeding before the Board of Supervisors to change such actual rate established and collected; and *because* the statute confers this as an original right to be exercised only upon the petition of twenty-five inhabitants and taxpayers of the county (and perhaps then only as to future easements).

This position it seems to us is not more defensible than that one just considered, viz: that the statute only means to forbid the corporation at any given time to exceed the rates it then wants. For to sustain this position, it was not alone necessary to import, whence we know not, the strange doctrine that the corporation and the citizen can make no contract about a necessity of human existence; and its inseparable running mate—that other doctrine, to which Americans are all unaccustomed, that the corporation is the Political Superior of the citizen; but it was also necessary to contravene the plain purpose and intent of the statute. For the very purpose of the statute in the denial of the right to the corporation, is that it shall not even apply before the Board (where there could be a tribunal, notice, a hearing of all concerned and limitations set) to break in upon the maximum of the rates it has itself established at the outset, and of which it has secured the acceptance by the whole community of irrigators. Much less then do the statutes contemplate that it shall in its own arbitrary discretion break up the rates which it has itself made the basis of vested rights.

It is incredible that the statute should hedge about the power of the Board with the fundamental safeguards of a judicial proceeding, and yet contemplate, as a matter of mere construction, that the corporation may exercise a similar power without any limitations whatever as to *when, how, how often* and to *what extent* it may change the rates.

Under this head we submit then that the general scheme of the regulation and control of rates by the statute, is the fixing of maximum rates, and prohibiting the corporation from exceeding them.

That when the Board of Supervisors has acted, this maximum is to be looked for in its ordinance.

That where it has not acted this maximum is the "actual rates established and collected."

That it is undeniable that in the history of the San Diego Land & Town Company the \$3.50 rate did become the "actual rate established and collected."

That the statute expressly denied to the corporation the power to exceed it.

And that the Circuit Court is inherently without power to repeal such legally established rate and establish the new rate of \$7.00.

*Interstate Com. Commission v. Railway* 167 U. S. 479, 499, citing *Chicago, Milwaukee, etc., Railway v. Minnesota* 134 U. S. 418, 458; *Reagan v. Farmers' Loan & Trust Co.* 154 U. S. 362, 397; *St. Louis & San Francisco Railway v. Gill* 156 U. S. 649, 663; *Cincinnati, New Orleans, etc., Railway v. Interstate Com. Commission* 162 U. S. 184, 196; *Texas & Pac. Ry. v. Interstate Com. Commission* 162 U. S. 197, 216; *Munn v. Illinois* 94 U. S. 113, 114; *Peck vs. Chicago & Northwestern Railway* 94 U. S. 164, 178; *Express Cases* 117 U. S. 1, 29.

**THE ACT OF MARCH 2, 1897.**

But not only is the public policy to respect and maintain contract relations between corporations and irrigators declared by the Section 552 of the Civil Code and Sections 5 and 8 of the Act of 1885; but the legislature to provide, in terms that could not be mistaken, against the misconstruction of the former acts in respect of such policy, passed the Act approved March 2, 1897, inserting a new section in the Act of 1885; such Section is as follows:

Section 11 1-2. "Nothing in this Act contained  
"shall be construed to prohibit or invalidate any con-  
"tract already made, or which shall hereafter be made,  
"by or with any of the . . . corporations described in  
"section two of this Act, relating to the sale, rental or  
"distribution of water, or to the sale or rental of ease-  
"ments and servitudes of the right to the flow and use  
"of water; nor to prohibit or interfere with the vest-  
"ing of rights under any such contract".

If this Act is valid, it settles, so far as the legislature is concerned, the question of public policy, on which the opinion of the court below turned, and clears away any doubt as to whether contracts for creating easements, and as to the rates upon which they may be enjoyed, may be made. The statute declares in substance, that such contracts are not opposed to the public policy of the State in the regulation and control of the sale and rental of water.

The act having been passed while this case was still

pending, and after September 14, 1896, the date of the opinion referred to in the decree, the court heard argument upon the effect of this act on the merits of the case, and rendered its opinion which is reported in *Lanning v. Osborne* 82 Fed. R. 575.

The court adhered to its former opinion hereinbefore quoted from, to the effect that:

"It was not within the power of either the corporation making the appropriation, or of the consumers, to 'make any contract or representation that would at all take away or abridge the power of the State to fix "and regulate the rates".'

And, on the subject of the statute of 1897, said (*Ibid* 577, 578):

"The amendment of March 2, 1897, has not been construed by the Supreme Court of the State, so far as I am advised. Whatever the reason for its enactment, or its real design, it is very certain, that this court has not the power to add to its language, nor 'the right, by construction, to import into its provisions a meaning not in consonance with the provisions of the constitution of the state.'

"The amendment does not purport to provide any manner of fixing water rates, nor does it purport to make valid any contracts otherwise invalid. . . . If the contracts set up in the amended answer of the defendants were void in the absence of the statutory amendment of March 2, 1897, it is manifest that that amendment did not give validity to them. As already said, the amendment does not even purport to make valid any contract otherwise invalid, nor does it provide any manner of fixing water rates. "invalidity of any and all contracts for the furnishing of water appropriated for sale, rental or distribution under any by virtue of the constitution and laws of

"California, other than as prescribed by that constitution  
"and those laws, is, in my opinion, clearly and suffici-  
"ently demonstrated in the opinions heretofore ren-  
"dered in this cause, to which reference has been  
"made."

It is very true that this act does not proceed upon the assumption that "*any and all contracts for the furnishing of water appropriated for sale, rental or distribution*" entered into before its enactment, were invalid; and also that it does not assume to make valid, contracts that were before invalid.

What this act does do, and we submit ought by the court below to have been held to do, is, as already stated, to declare the legislative will that contracts relating to water supply shall not be considered to be against public policy, and that the former act of the legislature shall not be construed to prohibit or impair such contracts already made or to be made.

It does not weaken, but strengthens the force of the statute, that the legislature by this act clearly implies that, in its view, these contracts, under the constitution and the law, never were invalid; and that it fortifies them against the opposite view of the public policy of the state which the court in this case gathered by construction from the constitution and statute of 1885.

Now it is well settled that where parties make a contract otherwise fair and complete, and not *malum in se*, but which, when made, is contrary to a view of public policy, embodied in the statutes of the state;

and the legislature reverses this view by a subsequent act, which, by its terms applies to the pre-existing contract, removing the inhibition, such later act, neither impairs the obligation of the contract, nor deprives either party of property without due process of law, nor undertakes to make a contract where there was none before. And the contracts are to be enforced according to their terms.

*Gross v. United States Mortg. Co.* 108 U. S. 477, 488, 489.

*Ewell v. Daggs* 108 U. S. 143, 150, 151.

*Watson v. Mercer* 8 Peters 88.

*Satterlee v. Mathewson* 2 Peters 380.

*White Water Co. v. Valette* 21 How. 414, 425-6.

*Town of Danville v. Pace* 2 Gratt. 1, 11, 18.

*Foster et al v. Bank* 16 Mass. R. 245.

*Andrews v. Russell* 7 Blackf. (Ind.) 474, 475.

*Bleakney v. Bank* 17 S. & R. 63, 65.

*Hess v. Werts* 4 S. & R. 356.

*Washburn v. Franklin* 35 Barb. 599, cited with approval in *Little Rock v. Bank* 98 U. S. 308, 314, 315.

*McMahon v. Bower* 39 Conn. 316.

*People v. Los Angeles Ry. Co.* 91 Cal. 338.

*Dentzel v. Waldie* 30 Cal. 138.

*Shaw v. R. R. Co.* 5 Gray 162, 179, 180.

Since the legislature may, by a change of its declaration of public policy, remove the bar of its former dec-

laration against the validity of a contract, so that courts are bound to follow the later declaration and uphold such contract, surely the courts are bound to follow the legislative declaration of a policy consistent with and in direct line with its prior legislation.

The Act of 1897 applies to the contracts express and implied set forth in the answer; it affirms them according to their true meaning and intent; it protects the vested rights under contracts whether relating to easements or rates; and the courts have no right to differ from the legislature on the subject, unless the State Constitution itself forbids such contracts.

What was meant by the clause from the opinion last cited, that "*the amendment does not provide any manner for fixing the rates*" is not clear. For since the amendment provides in substance that parties shall not be considered to have been or to be deprived of their right to contract respecting the sale, rental, or distribution of water, or respecting the sale of easements and servitudes of the flow and use of waters, why do these provisions not of necessity, embrace the consideration for a sale or rental, or in other words the rates or compensation? The manner of fixing the rates then which the Act declares shall not be prohibited or interfered with, is fixing them by contract.

And it is this which the court deems not to be in consonance with the State Constitution. (See language of its opinion above italicized). In effect the court

holds the Act of 1897 to be in conflict with Art. XIV of the Constitution.

We have given our views upon the proper construction of the Constitution upon this question, in subdivision 1 of division V of this brief. Anything further to be said in that behalf may conveniently be stated in division VII of our argument.

As before insisted this contract rate of \$3.50 per acre per annum is identically the same as the "actual rate established and collected" within the meaning of Section 5 of the Act of 1885; it is the contract rate which has by long practice grown into the rate *status* defined by the statute. The law of 1897 is in full harmony with the Act of 1885; and the corporation cannot lawfully exceed that rate because it is a contract rate; and, because the statute has adopted it as the maximum, and declared that it shall be deemed and accepted as the legally established rate; and that it shall not be exceeded.

## VI.

### STATE CONSTITUTION.

What we shall submit in subdivision VII of this brief with respect to the Fifth and Fourteenth Amendments applies to the Article I, Sec. 1 of the State Constitution. We refer to what is there submitted, to show that the true construction of Art. XIV must be in harmony with and not adverse to the right to contract respecting the use of water.

**The Conception enforced by the decree is in conflict with Article 20, Section 9, of the State Constitution, viz.:**

"Sec. 9. No perpetuities shall be allowed except for eleemosynary purposes."

An essential feature of the construction of Art. XIV of the State Constitution, as enforced by the decree, is that it makes the interest of the corporation in its water system, inalienable and a perpetuity as against all users of the system.

The ordinary use of the term "perpetuity" is as applied to certain future interests in real or personal property, made subject to a condition precedent. Or, to quote the definition of Lewis on Perp. p. 164:

"A future limitation whether executory or by way of remainder, and of either real or personal property, "which is not to vest until after the expiration of, or "which will not necessarily vest within the period fixed "and prescribed by law for estates and interests; and "which is not destructible by the persons for the time "being entitled to the property subject to the future "limitation, except with the concurrence of the individual interested under that limitation."

Such are the perpetuities contemplated by Sections 715, 716 of the Civil Code (Appendix):

"Mr. Justice Powell in *Scattergood v. Edge* 12 Mod. 278 distinguished perpetuities into two sorts, absolute and qualified, meaning thereby, as it is apprehended, a distinction between a plain, direct and palpable perpetuity, and the case where an estate is limited on a contingency, which might happen within a reasonable compass of time, but where the estate nevertheless from the nature of the limitation, might be kept out of commerce longer than was thought agreeable to the policy of the common law."

Randell Perp. 49, as quoted in Bouvier's Law Dic. under term "Perpetuity."

The following is quoted from 18 Am. & Eng. Enc. of Law 1 Edn. p. 381 note:

"Actual perpetuities. In many states there are constitutional prohibitions of perpetuities in the strict sense; with these, however, the Rule against Perpetuities has no connection."

It seems, however, that the view of Mr. Justice Powell is correct, and that a constitutional provision, like that of this state against perpetuities, covers both sorts of perpetuities, the absolute and actual, and the qualified, future, and contingent class.

Instruments conveying real or personal property, which undertake to create a plain, direct and palpable perpetuity, are disposed of by the common law doctrine re-enacted in our Civil Code, Sec. 711, which is as follows:

"Sec. 711. Conditions restraining alienation, when repugnant to the interest created, are void."

It was said in *Oxley v. Lane* 35 New York 340, 346 in the opinion of the court:

"It is well settled that, at common law, a perpetual and total restriction upon the power of alienation of an estate in fee simple is void, as repugnant to the estate, and its failure does not affect the validity of the grant or devise. (Citing authorities.)"

But in the case at bar the supposed restraint against alienation of freehold easements by the corporation is not contained in its title deeds to any part of its water

system, whether the title was derived in whole or in part under a Spanish grant, or under the Government of the United States or the State, by patent of land, or appropriation of water on public land or otherwise.

But the supposed restraint upon alienation of such easements is conceived to be imposed from without the chain of title, by the Constitution and statute of the State; for it is assumed that they have made this Kansas corporation and its successors in interest, perpetual absentee landlords of the irrigators, under the water system, at an equally perpetual rental, to produce a net revenue guaranteed by law.

In addition to the other constitutional grounds why the State cannot thus deprive the corporation of the right to sell and the irrigators of the right to buy and pay once for all for their easements in freehold, above dwelt upon, is the plain, direct, everlasting *No* of the State Constitution "*No* perpetuities shall be allowed."

The reason at the bottom of this constitutional provision which makes it applicable to the suspension of alienation by any limitation or condition, for a longer period than during the continuance of the lives of persons in being under our statute, is of more emphatic application where the restraint purports to be absolutely perpetual. 2 Blackstone p. 174 states this reason thus:

"Because by perpetuities (or the settlement of an interest, which shall go in the succession prescribed, "without any powers of alienation) estates are made

"incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established."

In the history of our own country, there is the memorable experience of converting the patroon estates of New York and the proprietary estates of Pennsylvania into freeholds. Great Britain is passing through a prolonged and severe experience in the effort to turn estates of absentee landlords into peasant proprietorships. Lecky's Democracy & Liberty Vol. 2 pp. 167-208.

It is not in the light of the warnings of history, for the people of California to fall back under this strange composite scheme which in one aspect seems to be an atavistic recrudescence of the old Spanish system of communal ownership of waters (See *Vernon Irrigation Co. vs. Los Angeles* 106 Cal. 237, 244, 248); but in another, shows the interjection of private corporations between the government and the irrigators, as the political superiors of the latter and endowed in the first instance with the powers of the government over the water supply, and those who are dependent upon it. This would make each corporation a sort of a little chartered East India Company, combining the functions of a corporation for profit with those of government; and it would exhibit the interesting spectacle of the sovereignty of the State over its waters on its travels, first vested in a Kansas corporation; next in the Receiver of a United States Court, residing in Massa-

chusetts; and next vested by him, pursuant to the sale of the property, in a Maine corporation; from which it would seem to follow that the sovereignty of this State is both peripatetic and a merchantable commodity.

But no such scheme of perpetual landlordism of the water supply, the provision of the State Constitution declares, shall be allowed; for a perpetuity, under the conception of the decree, it would be, of the most absolute and objectionable sort.

## VII.

**If however the construction of the provisions of the State Constitution and Statutes as enforced by the rulings and Decree of the Circuit Court is correct then:**

**1st. Those provisions themselves are in conflict with the Constitution of the United States.**

**2nd. And whether such construction was erroneous, or not erroneous, the Acts of the Receiver, and the Judgment of the Court, were alike an unconstitutional exercise of the Power of the United States.**

The leading concepts enforced in the rulings and decree in this case, concerning Art. XIV of the State Constitution, and such statutes as the court below held to conform to it, have thus far been discussed with the view of ascertaining whether they correctly interpret the provisions of the State Constitution and statutes, in themselves considered.

Assuming now, that such interpretation is correct,

and that the settled policy of the State of California is, as the learned Circuit Court conceives it to be, it is proper to survey the general outline of the scheme, as so conceived, for the regulation and control of the relations between water corporations and irrigators, in order that it may be considered in its relation to fundamental principles.

Whether that conception is right or is wrong, the original decree is an actuality as to every defendant; and each defendant is entitled upon this record, to have applied to that conception and interpretation so enforced, the tests of the constitutional provisions invoked against it, in the answer to the original bill and in the bill of review, for the protection of his personal and property rights.

This scheme then involves:

1. That in California there can be no freehold or allodial ownership of irrigation easements and servitudes under the system of any water corporation; since the feature of rents to yield "net annual receipts and profits" on the value of the system, is made exclusive and perpetual; and as the statute now stands, this net annual income above all expenses of repairs, management and operation, is to be not less than six per cent, nor more than eighteen per cent on such value.
2. That when the corporation has constructed its system, its investment must remain locked up in the system so long as it endures; and the corporation must

be content with rates, to yield such net annual revenue as it can obtain within the minimum and maximum fixed by the statute.

3. That to effect these ends, any and all legal capacity of the corporation and land owners to make contracts relating to the water supply or rates or compensation therefor, is taken away; and, the whole control and regulation of the annual rates is by the State; that its power is delegated and committed first to the corporation itself, as representing the State; conditioned, however, that upon the presentation of a petition signed by twenty-five inhabitants and taxpayers of the county, the power of future regulation shall be exercised through and by the Board of Supervisors upon hearing had; but always within the minimum and maximum limits fixed by statute.

4. But that in no case has any irrigator any direct or autonomous voice, or volition in the matter, either as to terms for acquiring, or rates for the enjoyment of irrigation easements, whether at the outset of his use, or thereafter.

5. That so long as the Board of Supervisors has not fixed maximum rates, the irrigator has no recourse to the courts against any increase of rates by the corporation from the actual rates established by it at the time of the easement vested, and thereafter collected by it, nor any judicial remedy against the act of the corporation in shutting off the water to enforce payment of such increased rates.

In considering the subject, we are not unmindful of the rule that when the meaning of constitutional and statutory provisions upon a subject is clear, arguments *ab inconvenienti* are of little or no weight, either in the construction or administration of the law.

But we may also remember, that all the constitutional guarantees of fundamental rights are in a sense *contra inconvenientia*; they are safeguards against the practical consequences of abuses of the powers of government, tendencies to which history shows, and the constitutions assume, to be constant and recurring.

While the mere statement of the features of this remarkable scheme for the regulation and control of the waters of California is sufficient to point the constitutional argument, it is proper and necessary to notice the grave and practical consequences, present and potential, of this revolutionary and reactionary conception; for it has been enforced against the appellants and they present themselves here bound to it by the injunction and decree of the court.

The defendants were, somewhat sternly, told by the court in its opinion (76 Fed. R. p. 338) that:

"All persons are presumed to know the law, and those who bought lands from the complainant corporation upon its representations that water for irrigation would be furnished at the annual rate of \$3.50 an acre, or otherwise acted or contracted with reference to such rates, must be held to have known that the Constitution conferred upon the legislature the power, and made it its duty to prescribe the manner in which such rates should be established."

This scheme of regulation at once separates water companies and irrigators into hostile camps; it keeps their adverse interests at the maximum; and while neither can exist without the other, it forbids them to settle their relations by mutual agreement; but arms the corporation, as a political superior, with an arbitrary power over vested interests in the water supply and tenders to it, as the inducement to exercise such power, a sliding scale of net revenue ranging from 6 to 18 per cent.

It in turn would give to the inhabitants and tax-payers by way of defense to the aggressions which it encourages, the power to institute a proceeding before the Board of Supervisors, which is to result in future rates yielding not less than 6 and not more than 18 per cent net revenue per annum on the estimated value of the system for the time being; and for the better consoling of both parties points the way to the vista beyond, of indefinite litigation over the Board rates afterwards.

It ordains that irrigation communities shall labor under what is substantially an irredeemable interest bearing public debt, the estimates of the principals of which shall be open to be fought over before supervisors and courts each year, and from year to year, until exhaustion comes to one party or the other—but never to be settled by agreement; but not only the principal, but the rate of interest within the tremen-

dious range between six and eighteen per cent per annum is also thrown into this witches' caldron,

"For a charm of powerful trouble  
"Like a hell-broth boil and bubble."

This state of things is to be perpetual, because no corporation shall be permitted to realize upon its investment by sales of easements; no man shall be permitted to buy and pay for his easement; nay, if he has bought and paid for it, a stinging reminder of his un-wisdom is added to the loss of his money.

The corporations are by the sheer force of the law, lifted up into Water Lords and the irrigator under this new Feudal system, is bound to a rent service forever, in the fixing of which he shall not have the voice of a freeman.

Is it any wonder that prosperity flees from communities blighted under a system which would reverse the maxim *interest republicae ut sit finis litum*; or, that the sales of lands by the corporation whose works are already constructed, have stopped; or, that work has ceased on the two greatest systems in Southern California now under construction, the Arrowhead in San Bernardino County and the Southern California Mountain Water Company in San Diego County, for the publicly stated reasons, that until contract relations are once more permitted they cannot venture to complete their systems and throw them open to the public?

But the unfortunate communities where the corporations already have their systems under operation and the people have already settled, are thus set by the ears and left to fight, with no hope of ever getting it fought out.

This system will demoralize the best men in corporations and make anarchists of the most law-abiding irrigators under their rule.

But to what end is all this? Because, we are told by the opinion, "to hold valid and binding any contract between parties with reference thereto (the rates) "would be in effect to ignore and set aside the provisions of the statute upon the subject."

It seems to us that this approaches perilously near to the doctrine, that men are made for the government, and not the government for men.

For the exposition of this philosophy of popular government, we must go to the writings of La Salle and Marx and Bellamy, and not to Marshall or Kent or Story.

If, indeed, the malady of the State Constitution is so deep, that the declaratory act of 1897 is insufficient to cure it, then a last resort must be made to the stronger medicaments, and the more heroic surgery of the Constitution of the United States.

The provisions of the Constitution invoked are Sec. 1 of the Fourteenth Amendment:

"No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States; nor shall any States deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;"

Also the provision of Amendment V that no person shall "be deprived of life, liberty or property without due process of law;"

And Art. IV, Sec. 4, that "the United States shall guarantee to every State in this Union a republican form of government."

This court in *Holden v. Hardy* 169 U. S. 366, 391, considering the Fourteenth Amendment, said:

"As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a State law which undertakes to deprive any class of persons of the general power to acquire property, would also be obnoxious to the same provision. Indeed, we may go a step farther, and say that, as property can only be legally acquired as between living persons by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid."

*Powell v. Pennsylvania* 127 U. S. 678, 684.

In *Allgeyer v. Louisiana* 165 U. S. 578, 589, it was said:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of

"the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live "and work where he will; to earn his livelihood by any "lawful calling; to pursue any livelihood or avocation, "and for that purpose to enter into all contracts which "may be proper, necessary and essential to his carrying "out to a successful conclusion the purposes above "mentioned."

In the early case of *Van Horne v. Dorrance* 2 Dall. 304, 28 Fed. Cas. page 1012, 1016 (April, 1795) in speaking of the Constitution of Pennsylvania, then under consideration, it was said by Circuit Justice Patterson:

"The Constitution expressly declares, that the right "of acquiring, possessing and protecting property is "natural, inherent, and unalienable. It is a right not "ex gratia from the legislature, but ex debito from the "Constitution."

In the concurring opinion of Justices Bradley, Harlan and Woods, in *Butcher's Union Company v. Crescent City Co.* 111 U. S. 746, 764-5, after enumerating certain of "those fundamental privileges and immunities which belong essentially to the citizens of every free government," including the right of protection; the right to pursue and obtain happiness and safety; to institute and maintain actions of any kind in the courts of the State; and to take, hold and dispose of property, either real or personal, they are referred to as,

"These primordial and fundamental rights".

In the same case, *ibid* p. 756-7, in his concurring opinion, Mr. Justice Field said:

"As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so *certain inherent rights lie at the foundation of all action*, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, 'that new evangel of liberty to the people.' 'We hold these truths to be self-evident'—that is so plain that their truth is recognized upon their mere statement—that all men are endowed—not by edicts of emperors, or decrees of parliament, or acts of Congress, but 'by their Creator, with certain inalienable rights'—that is rights which cannot be bartered away, or taken away, except in punishment for crime—and that among these are life, liberty and the pursuit of happiness, and to secure these—not to grant them, but secure them—'governments are instituted among men, deriving their just powers from the consent of the governed.'"

To use the language of Justice Peckham in *Allgeyer v. Louisiana, supra*, at p. 590:

"It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty' as contained in the Fourteenth amendment." And they apply here because this case involves both monopoly and deprivation of liberty.

The case of *Leep v. Railway Co.* 58 Arkansas 407, 25 S. W. Rep. 75, was approved and followed in the case in the same court which was brought to this court in *St. Louis, Iron Mountain, etc., R. R. v. Paul* 173 U. S. 404.

The case involved the construction of a statute of

Arkansas, the provisions of which, so far as necessary, to show the application of the following extracts from the opinions of this court, and the State court, were in substance, that:

"Whenever any railroad company, corporation or persons engaged in operating or constructing any railroad or railroad bridge, or any contractor or subcontractor engaged in the construction of any such road or bridge, shall discharge with or without cause any servant or employee thereof, the unpaid wages of any such servant or employee, then earned at the contract rate, without abatement or deduction, shall be, and become due, and payable, on the day of such discharge."

This court affirmed the judgment and speaking of the decision of the State court in the former case as followed in the later, said, *inter alia, ibid, 408:*

"The general subject of the lawfulness of limitations on the right to contract were considered at length, with full citations of authority, in both these decisions."

And on page 406 this court said:

"The court conceded that the legislature could not, under the power to amend, *take from the corporations the right to contract, but adjudged that it could regulate that right by amendment, when demanded by the public interest, though not to such an extent as to render it ineffectual, or substantially impair the object of the incorporation.*"

And in tracing the line between valid and invalid legislation this court further said *ibid 409:*

"This act was purely prospective. It did not interfere with vested rights, or existing contracts, or de-

*"stroy or sensibly encroach upon, the right to contract"*  
 "although it did impose a duty in reference to the payment of wages actually earned, which restricted future contracts in the particular named."

From the opinion in the case of *Leep v. Railway, supra*, thus approved, we cite the following extracts (25 S. W. 79):

"We have thus far spoken of the limitations that can be imposed on the right to contract. We have seen that the power of the legislature to do so is based "in every case on some condition and not on the absolute right to control. We think it is obvious that the right to contract cannot be limited by arbitrary legislation which rests upon no reason upon which it can be defended; for, if it could, the right would cease to exist, and become a license revokable at the will of the legislature, and the government would become a despotism in theory, if not in fact. Such a power cannot exist, for, if it could, it would be subversive of the right to enjoy and defend liberty, to acquire and possess property, and to pursue happiness, declared to be inalienable by the Constitution of this State."

"When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof."

And from *ibid* 25 S. W. Rep. p. 81.

"The legislature cannot regulate or restrain the right of individuals to contract by making it unlawful for them to agree with each other that wages shall be paid at any specified time subsequent to the day on which the labor by which they are earned shall be completed, or that the price of property sold shall be paid on a day subsequent to the sale . . . .

"But what is true of persons is not always true of corporations. Natural persons do not derive the right to contract from the legislature. Corporations do....

And from page 83 *ibid*:

"It is obvious that the legislature cannot, under the power to amend, *take from the corporations the right to contract*; for it is essential to their existence. *It can regulate it when the interests of the public demand it, but not to such an extent as to render it ineffectual, or substantially impair the object of incorporation.*"

And from page 84 *ibid*:

"Tested by the principles of law we have indicated, "the act under consideration is unconstitutional so far "as it effects natural persons. As to corporations it is "a valid statute. *It does not seriously impair their right "to contract, but leaves them to contract with their employees on profitable terms.*"

If any more authority were needed to demonstrate that the right to make all just contracts concerning such a necessity as water for irrigation in California, exists, we may invoke the constitutional history of England and our own country—and the history of modern civilization.

We do not forget that we are not holding a brief for the corporation and that upon this occasion it is no part of our duty to maintain its rights further than they necessarily involve the rights of the defendants.

But it appears by the original bill (Trans. folio 12), "that no other person or corporation is or ever has "been furnishing a supply of water to said defendants

".....nor is there now nor has there been any system of water works by which said defendants can be furnished with water."

It also appears from the bill and answer that the corporation appropriated all the water of the Sweetwater river, which is the stream which naturally supplies the region along its banks and upon the adjoining mesas; in fact the corporation controls what is necessarily a monopoly of the water supply for this territory.

Under such circumstances an absolute and unconditional prohibition to the corporation to make contracts with the defendants relating to water rights or respecting compensation and rates therefor, is a similar prohibition to the defendants. Upon the hypothesis, though there were other corporations which could furnish water, contracts with any of them would likewise be interdicted. It is a fact of such public local notoriety that we may perhaps allude to it here, that with the exception of the reservoir and water rights held by an Irrigation District at Escondido, in this county, every reservoir site, stream and rivulet in this county is held and controlled by various corporations organized for profit. There is a growing tendency in the irrigating regions of the State to form water corporations on the mutual plan, that is, one in which the irrigators are the only stockholders who become owners of the stock in proportion to their water rights. An illustration of this form of organization is furnished in *McFadden v. County of Los Angeles*

74 Cal. 571. Such doctrines of State control as have found acceptance in this case, may well account for the hastening tendency to this form of organization.

But generally speaking, it is true that the control of the water supply of the State has gravitated to private corporations organized for profit. The tremendous significance of the sweeping and blasting doctrine that no land owner can acquire and protect irrigating servitudes upon any water system, annexed as easements to his land, by contract with such corporations; and that the corporations cannot dispose of the servitudes for an agreed price, or for an agreed sum and a stipulated annual rate afterward; that the joint effort of both irrigator and corporation cannot eliminate the element of annual net revenue upon the value of the easements from their relations, by sale and purchase, and payment and acquittance of the price for water rights—can hardly be fully appreciated by any one not intimately and widely acquainted with the environment.

For no corporation will construct new systems; but few—and those misled by their conception of civil liberty drawn from the native air—will buy land under the old systems; and all are anxious to get out from under the mere portent of doctrines so odious as that the irrigator can have no independent contractual voice about water rights or rates. Let any one imagine that the same socialistic doctrines were carried into the law as to mere land; and let him then remem-

ber that the water supply is the other and more costly half of tillable and habitable real estate in this region, and he can begin to conceive how utterly repugnant the concept is to every instinct of an enterprising, self-respecting, law-abiding, contract-keeping and Anglo-Saxon people.

This culprit conception, as instigating the original bill; as employed by the Receiver in shutting off the water supply (folio 15); as embraced in the orders and apprehended in the decree of the court, we here arraign in the name of the Constitution on the grounds:

*First.* In that it would deprive these appellants of their liberty of contract for their water rights and irrigation easements, without due process of law.

*Second.* In that it has deprived them of their vested property and contract rights in their irrigation easements without due process of law.

*Third.* In that it has deprived these appellants of the equal protection of the laws, by setting over them the corporation as their Political Superior, with arbitrary power to legislate into force new and increased water rates—to affect their vested rights—to impose on the appellants its own judgment as to their reasonableness; and to execute such judgment by the power of forfeiture—and at the same time denying to them the right to resort to any judicial tribunal.

*Fourth.* In that it has employed the power of the United States, acting by a Receiver of a court of the

United States and through the orders, decree and injunction of such court, in depriving the appellants of their liberty and property without due process of law in contravention of the Fifth Amendment to the Constitution.

*Fifth.* In that entering into the Constitution and frame work of the state government, it renders such government not republican in form; for that under that conception such Constitution denies, in the foregoing respects, to its citizens the right to contract or to acquire property; or to free the same of debt; and binds them to the corporation as a Political Superior in a perpetual rent service in the rating of which they have no voice.

The orders and decree of the Circuit Court constitute the primary subject of the bill of review; all else relating to the acts and claims of the corporation and its Receiver, are drawn before the court in the train and viewed through the media of the orders and decree of the court.

As already pointed out (subdiv. II of this brief) the practice of the High Court of Chancery made it among the functions of such a bill filed on the ground of error, to bring the original proceedings and decree before the same court for re-examination, as to whether they are contrary to some statutory enactment, or some principle of law or equity, recognized and acknowledged, or settled by decision.

Such a bill is so far privileged that it may be brought without leave of the court previously given. Mitford's & Tyler's Pl. & Pr. in Equity. 1 Ed. 181.

If in England a decree may be thus made the specific subject of examination as to whether it is contrary to an act of Parliament, it must be true that a decree may be here examined as to whether it conflicts with any provision of the Constitution.

It was held in *Chicago, Burlington & Quincy Railroad Company v. Chicago* 166 U. S. 226, 233:

"But it must be observed that the prohibitions of "the (Fourteenth) amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and therefore, whoever by "virtue of public position under a State government "deprives another of any right protected by that "amendment against deprivation by the State 'violates the constitutional inhibition; and as he acts in "the name and for the State, and is clothed with the "State's power, his act is that of the State.' This "must be so or as we have often said, the constitutional prohibition has no meaning, and 'the State has "clothed one of its agents with power to annul or "evade it.' *Ex parte Virginia* 100 U. S. 339, 346, "347; *Neal v. Delaware* 103 U. S. 370; *Lick Wo. v. Hopkins* 118 U. S. 356; *Gibson v. Mississippi* 162 U. S. 565. These principles were enforced in the recent "case of *Scott v. McNeal* 154 U. S. 34, in which it was "held that the prohibitions of the Fourteenth Amendment extended to 'all acts of the State, whether "through its legislative, its executive or its judicial "authorities.' "

Now, in the case at bar, the Federal Court was administering the Constitution and laws of the State.

Its decisions construing the State Constitution and laws have no more or greater immunity from the Fourteenth Amendment than a similar decision by the State Court. If the constitutionality of a like decision by the State Court, when drawn in question and put in issue under the Fourteenth Amendment in the courts of the State, would have supported a writ of error from this court, both as to the appellate jurisdiction and the merits, then the issue joined by the demurrer to the bill of review which assigns error in the proceedings and decree under the same amendment, supports this appeal both upon the jurisdiction and the merits.

But this is not all. The provision in the Fifth Amendment of the Constitution that no person shall be deprived of life, liberty or property, without due process of law, is the cognate of the like provision in the Fourteenth Amendment; the Fifth Article is addressed to the United States;

*Speis v. Illinois* 123 U. S. 131; *In re Sawyer* 124 U. S. 200, 219; *McElvane v. Brooks* 142 U. S. 155, 158; the Fourteenth, to the states. The former amendment extends to all acts of the United States, whether through its legislative, its executive or its judicial authorities, just as the later amendment extends to the acts of all the departments of the states.

Therefore, if the force and effect of the rulings and decree of the Circuit Court is to infringe upon the constitutional prohibitions contained in either the

Fifth or the Fourteenth amendments, that is a substantive and independent ground here, both of jurisdiction and for relief.

That they do so contravene the provisions of the Constitution, we respectfully submit, has been fully pointed out.

The State Court has not expressly decided the questions ruled upon by the Circuit Court. While this court has therefore power and jurisdiction to revise the construction placed by the Circuit Court upon the State Constitution and statutes, yet, if it finds, as we argue, that it was erroneous, still the decree of the court below is itself a specific subject and entity before the court to be tried on constitutional grounds, as well as upon other grounds of error alleged in the bill of review.

Hence, whether the construction placed by the Circuit Court on the State Constitution and laws was erroneous, or not erroneous, its decree is still an unconstitutional exercise of the power of the United States.

Again, since the Constitution commands the United States to guarantee to each State a republican form of government, this command extends to every department of the Federal Government. The judiciary is not to assist the State authorities in establishing a dogma of government under which no person can in California buy an irrigation water right from a corporation, nor contract with it in any form for the terms

and rates upon which such property may be enjoyed; but under which essential and tyrannical powers of government, are avowedly as such, transferred to mere private corporations.

If this thing can be done with respect to the water supplies of California, it can be done with respect to the lands. And if it can be done with either, then the doctrines of Henry George are already justified; and the declaration of the Constitution, that the United States shall guarantee to each state a republican form of government, which an eloquent statesman characterized as "The sleeping giant of the Constitution" is like the beguiled and betrayed wizard, Merlin,

"Lost to life and use, and name and fame."

We most respectfully submit that this conception has under Article 4, Section 4, no constitutional place in the form and framework of the government of this State.

And that on the whole, the Fifth and Fourteenth amendments and Article 4, Sec. 4 of the Constitution make this conception of the policy of this State as enforced and applied by the order and decree of the court, void, and the decree erroneous.

## VIII.

**The Original Bill States no Cause of Action.**

**Application of the foregoing discussion to the original bill shows that it not only states no cause of action; but shows affirmatively that there is none.**

One of the grounds for sustaining the bill of review of a decree *pro confesso* is, that the decree is not sustained by the allegations of the original bill. (See cases cited in division II of this brief, at p. 88).

We respectfully submit that not only does the bill fail to state a cause of action, but that it affirmatively shows that there was and is none.

**A.**

For in the first place, it shows, that the rate of \$3.50 per acre, per annum, is the only "actual rate established and collected by the corporation"; that rate therefore, is to be "deemed and accepted as the legally established rate thereof" (Act 1885, Sec. 5); and since the bill shows that the corporation was *furnishing water* to the defendants for irrigation (folios 10, 12) at that rate, this case falls literally and specifically within the provision of Sec. 8 of the Act of 1885, which lays its command upon the corporation to furnish waters at rates *not exceeding* such legally established rate.

Therefore the affirmative allegations of the bill show

that the decree is against the very terms of the statute law.

**B.**

In the second place, apart from the statute law, the bill shows that the increase of rates, was in violation of the agreement, whether express, or tacit and implied, between the corporation and the defendants, at which the easements of the latter vested. For the original bill shows that the corporation fixed the irrigation rate at \$3.50 per acre, per annum (folio 13); and that at the rate so fixed by it, "each of said defendants has by purchase, or otherwise, become the owner of a water right to a part of the water appropriated and stored by said company, necessary to irrigate his tract of land" (folio 10). This \$3.50 rate then, upon principles of contract must, in the language of the bill (folio 10), be the "yearly rental such as said company is entitled to charge and collect."

So the allegations of the bill here again show affirmatively that the decree is erroneous.

**C.**

In the third place, and bearing in mind the ownership of their water rights by defendants, acquired through purchase or otherwise, what is the supposed equitable ground upon which the bill claims for the corporation the right to supersede the \$3.50 annual rate per acre by another twice as large? It is set forth in folios 12, 13 and 14, and is in substance: that in 1887, when the corporation was about to commence

furnishing water, and to fix and establish rates, including the rate for irrigation, it was informed by its engineer that its system and water supply would furnish sufficient water to irrigate 20,000 acres of land and in addition thereto the necessary water for domestic use inside and outside of National City; that the company was then unfamiliar with the cost of operating and maintaining a plant and system of the kind; that relying on such report and estimate of its engineer, as to the probable duty of its reservoir and the capacity of its system, and believing that by fixing and charging an annual rate of \$3.50 per acre for irrigation, it could meet its operating expenses and pay itself some interest on its investment, *it fixed and established*, and has since charged such rate of \$3.50 per acre, per annum, and no more, until January 1, 1896; but that experience has demonstrated that the system, instead of coming up to the engineer's estimate, will not supply water sufficient to irrigate more than 7,000 acres, together with water demanded for domestic use; that the rate of \$3.50 per acre, if the whole capacity of the plant were in use, is not sufficient to pay operating expenses and maintain its plant and system; and that in order to pay the cost of operating and maintaining the plant, and pay said company a reasonable interest on its investment in it, or a reasonable sum for its services in supplying water to the defendants and other consumers, it will be necessary for it to charge a rate per acre per annum of not less than \$7.00 for irrigation.

But the bill on its face shows (Trans. p. 9, folios 11, 12) that the aggregate amount of receipts from the system for the year ending January 1, 1896, was \$25,-715.00; from the allegation that the proposed increase of rate of \$3.50 per acre, with the amount of land now under irrigation, the additional revenue would amount to not less than \$14,000 per annum, (folio 16), there is to be inferred that such amount now under irrigation is 4,000 acres; the total capacity is alleged to be 7,000 or at least 6,000 acres, together with the water demanded for domestic use (folio 13); therefore the bill shows that only from four-sevenths to two-thirds of the capacity of the system is in use.

The bill further shows that rejecting from the total alleged annual expense of keeping the system in operation and repair, *including interest on bonds* (folio 11) such interest (folio 11), the annual expense does not exceed \$12,034.99 for the whole system.

It will not be disputed, we think, on the argument, that this amount included all taxes on the water system, counsel fees, the portion of the expense of the Boston office of the corporation attributed to the water department, as well as all local expenses of repairs, management and operation of the water system.

Therefore, the bill shows on its face, that the revenue from the system, only from four-sevenths to two-thirds employed, is to the annual expense of operation and management, and the keeping of the whole system in repair and ready for operation, as \$25,715, is to \$12,034.99 at the outside.

This shows from the bill itself, that the allegation in folio 13, that the revenue is not sufficient to pay operating expenses and maintain the system is not true.

The increase of rate then is really demanded to enhance net revenue; as is stated in folio 14, to "pay said company a reasonable interest on its investment in said plant."

The question therefore is presented upon the face of the bill, whether the allegation that the corporation overestimated the capacity of its system, or under-estimated the cost of repairs, operation and management, when it established the \$3.50 rate, shows sufficient equitable reason for the compulsory increase of rates in order to enhance the net revenue of the corporation.

It is on its face an attempt by one party to a mutual property relation, constituted at the terms proposed and established by that party, to shift the burden of its alleged under estimates and mistaken calculations upon the other party to the relation, in order to realize the expected profits.

For, we repeat, what has already been insisted upon, that the corporation with perfect freedom, and with special and exclusive means of knowledge of all the elements which should enter into its problem of rates, fixed them in advance and at them so fixed, invited the defendants to acquire their perpetual easements by purchase or otherwise.

The evils and injustice of violating this contractual relation in the manner disclosed in the bill, must exceed any possible inconvenience from adhering to the contracts made and so long acted upon by all concerned. If pleas of self-induced mistakes are sufficient to excuse such arbitrary exercise of power in the name of the State, as is shown in the bill, where is it to end?

The bill asserts (folio 11) a right to \$119,791.66 per annum from rates at the *lowest* legal maximum of net revenue when fixed by public authority. According to the bill the income from the domestic rates, which the corporation does not seek to increase, and therefore concedes are full high, is about \$11,715; if the excess beyond this sum, of the amount of \$119,791.66, the legal right to which is asserted, were enforced on the 4,000 acres of land now under irrigation, the irrigation rate would be over seven times that established when the easements of defendants vested. What it would be at the highest legal maximum of eighteen per cent, we do not attempt to compute. Even if this asserted right to net revenue from irrigators who have *purchased* their easements, or otherwise acquired them so that they stand as to rates on the same footing with purchasers, were spread over the whole 6,000 or 7,000 acres which the bill asserts are within the capacity of the system, still it would be a crushing burden and would mean simply the abandonment of the lands.

If it be answered to this, that the corporation does not now seek the full measure of its asserted legal

right to the \$119,791.66, but is for the present content with simply doubling the irrigation rate, instead of increasing it sevenfold or some other multiple, the rejoinder is, that the bill asserts the *power* on part of the corporation to increase the rate to the legal standard; and, if to net six per cent, why not to net eighteen per cent, since the statute declares that either of them or any rate between them, is lawful if imposed by a competent rate fixing power? A full exercise of the power, if it existed, would go far toward reducing the irrigators to the legal status of the Egyptian fellahs in the time of the Pharaohs.

If the contracts are to be disregarded, it is the grace, or prudential wisdom of the corporation, and its estimate of what the "traffic will bear", that would constitute the only saving element in the situation.

For, according to the bill, the Board of Supervisors could not lawfully fix the rates to yield less than the \$119,791.66; and the bill virtually admits that it does not seek to exact more than \$39,715 now, for the reason, as is quite apparent, that even the corporation does not believe, that the "traffic could bear" any more.

But the original bill alleges the right to a minimum return of \$119,791.66, per annum; this is decreed to have been confessed by defendants, after all protection by their contracts had been swept away. If the alleged self-induced mistakes of the corporation in fixing the original rate, is a good reason for doubling

that rate, so as to make it yield \$39,715, why has it not power under this decree to again increase the rate, on another January 1st, to yield the \$119,791.66 per annum?

*This shows why these defendants under this decree, find that the Constitution as so administered, bears fruits which are for them and for the corporation, apples of Sodom.* The corporation has stormed the citadel of the State Constitution and turned what were supposed to be the defenses of the irrigators, into vantage ground against them. If it were not a matter so serious, it would be ludicrous, to contemplate this complete reversal of the expectations from the declaration of the public use.

Here is a corporation which now yearns for the State to absolutely regulate and control its franchise to collect water rates. It would renounce all right to make contracts concerning them.

It is a most unheard of attitude for a corporation to take. Where in all the history of this court, or any court, is there to be found a parallel?

There must be some reason for this unnatural fondness for passing under the rod of public control.

Is it because there is the temptation to exchange the power to contract, for the power to play the part of the State in repealing an old and enacting an increased rate? Or, does the promise of escaping from its contracts prove seductive?

Or, when worst comes to worst, (or shall we say when the coveted end is attained), and the Board of Supervisors shall undertake to fix rates, does the supposed guarantee by the public power of a minimum of six per cent net revenue, whatever the value of the service, with the fighting chance in the field of politics, for higher rates up to eighteen per cent net revenue, console for the voluntary renunciation of the liberty to transact business by contract, as do all other corporations?

For where has it been heard that railway corporations could make no contract by bills of lading, or passenger tickets, or steamship lines, by charter-parties or passage tickets, because they are quasi-public corporations?

It is not necessary to make any formal answer. The phenomenon presents itself; it is an interesting subject of speculation.

But the bill presents no element of equity; in its essential theory, it neither follows the law, statutory or otherwise; it asks the aid of the court to enable the corporation to recoup from the irrigators, for its own alleged miscalculations respecting expected net profits from the rate at which it induced them to settle under the system; it invokes the court to do that which it has no power to do, to establish a rate; it advances to a decree over a pathway strewn with its broken contracts and with disrupted property relations, out into a weltering sea of uncertain strife, in

which all hope of prosperity of the company and the people must be swamped. It is respectfully submitted that the original bill of complaint states no case, and affirmatively shows that there was and is none; and therefore, that the errors alleged in the fourteenth, fifteenth, sixteenth, seventeenth and eighteenth assignments of errors on appeal (*Trans.* pp. 104-109) and in the corresponding specifications in this brief (pp. 69-70) are well assigned.

## IX.

**Errors upon the Merits, in sustaining Exceptions to Answer, submitted to have been well assigned.**

1. The answer, so far as it states the history of the water rights, easements and servitudes of the defendants, and shows that they vested pursuant to contracts express or tacit and implied, and are interests in reality; and so far as such answer states contracts express and implied respecting the rate of \$3.50 per acre, per annum for the continued enjoyment of such easements, is virtually in mere amplification of the allegations of the bill relating to the ownership by defendants of their water rights by purchase or otherwise (folio 10), and that the corporation at the outset fixed and established and thereafter to January 1, 1896, collected that rate and no more (folio 13).

So far as exceptions were sustained to all such matters contained in the answer, relating to vested easements of the defendants, and the contract rate of \$3.50 per acre, per annum; and to all matter in the an-

swer invoking the provisions of the State and Federal Constitutions, and the Statutes of the State, in protection of such rights, it is respectfully submitted, upon the foregoing discussion, that the errors alleged in the sixth, eighth, tenth and eleventh assignments of error on appeal (Trans. pp. 97, 100, 101), and in the corresponding specifications in this brief (pp. 54, 60, 61, 63) are well assigned.

2. So far as exceptions, first and fifth to the answer proceeded on the ground that the defendants had no standing in the court to contest the reasonableness of the rate of \$7 per acre, per annum, demanded by the complainant, it is respectfully submitted upon the foregoing discussion, that if it was competent for the corporation to supersede the \$3.50 rate per acre, per annum, and establish *any* higher rate, then the error in that behalf alleged in tenth assignment of error on appeal (Trans. p. 101), and in the corresponding specification in this brief (p. 62), is well assigned.

## X.

### Questions of Practice and Procedure.

#### 1.

**The question as to whether the Bill of Review lies has been discussed. (Ante p. 84 et seq.)**

#### 2.

**The Exception first to the Answer for Impertinence, was not the proper method for raising the question of the merits of the affirmative defenses set forth in the Answer.**

This question is formally raised by the first assignment of error in the Bill of Review (folio 104); and is

preserved in the *6th* assignment of error on appeal (folio 159); and the corresponding specification of error in this brief (p. 54). And it was competent to raise it by the Bill of Review. (See authorities cited *ante* p. 85).

It is apparent that the elaborate exception *first* to the answer, was made to perform the function of a demurrer to the validity of the defenses, and not of an exception for impertinency. The allegations of contract and statutory and constitutional rights, set up in the answer against the claim of power of the Receiver to increase the rate, were not in any sense impertinent or mere "tales of a tub" as an old Chancellor styled impertinent matters. *Harrison v. Perea* 168 U. S. 311, 318-319. They were pleaded as substantive and affirmative defenses; they raise important questions upon the merits, for decision; and some of them received from the court below the elaborate consideration, their importance deserved.

But the exceptions under guise of charges of impertinency, undertook to question, and were treated as questioning the validity of the answer as a defense, as though such exceptions were a true demurrer.

But a demurree to the answer is unknown in equity practice. *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 257; *Stone v. More* 26 Ills. 165, 172; *Brotan v. Mortgage Co.* 110 Ills. 235, 241; *Berry v. Abbott* 100 Mass. 396, 398; *Gretcher v. Wright* 75 Fed. 742, 743-4; *Teavers v. Ross* 14 N. J. Eq. 254, 258. In the case last cited, it is said:

"In equity a demurrer is only a mode of defense to the bill. It is never resorted to to settle the validity of a plea or an answer. Such method of proceeding is 'not recognized in the books.' (Citing numerous authorities).

The result of this practice was the expunging of all these defenses from the record, and the entry of a decree in form *pro confesso*. As already suggested, this left it doubtful whether a direct appeal from the decree *pro confesso* would have brought the questions presented by the answer, into the record, and before this court (see this brief p. 87). The defendants were thus constrained to perform the decree, and to file their bill of review, in order to make certain that the matter expunged from the answer was brought into the record.

But if the complainant desired to try the merits of the defenses as pleaded, the defendants had the right to have them finally tried, in the case set down for hearing on bill and answer; and not to have them tried only provisionally, as a sort of moot question, on those improper exceptions; and the defendants were entitled to have all the defenses in their answer before this court on an appeal direct from the original decree; and were entitled to have the whole case finally so disposed of by this court.

But unless the form of the other so called exceptions to the answer, amounts to a setting of this case down on the bill and answer, as to which we submit later on, a reversal or vacating of the original decree

below, might not be a final disposition of the case on the merits, but merely a decision of a question of pleading.

*In re Sanford Fork & Tool Co.*, 160 U. S. 247, 257

It is respectfully submitted, that the *fifth* assignment of error on appeal (Trans. p. 97), as correspondingly specified in this brief (ante p. 54), is well assigned.

3.

**The paragraphs Third, Fifth and Sixth under head of Exceptions taken by Complainant to the Answer of Defendants, are not Exceptions in any sense known to the practice in Equity; but, they amount to the setting down and submission of the cause on Bill and Answer; and appellants are entitled to have the cause so considered and disposed of.**

The third, fifth and sixth so called exceptions to the answer, are set out at page 60 of the Transcript, and copied in the statement of the case in this brief (ante pp. 45-6).

It is, we submit, apparent that these are not exceptions in any sense known to equity practice.

They do not constitute exceptions for insufficiency in the discovery, for they rely upon the disclosures in the answer as fully and affirmatively supporting the bill and as entitling complainant to the relief prayed for in his bill.

This being so, we submit that the filing of the charges in these paragraphs, and the bringing of the

cause to hearing, and the hearing upon them, was tantamount to the setting down and the hearing of the cause on bill and answer. Equity Rule 41 as amended at December term 1871, 13 Wall. XI. Equity Rule 60.

It was open to the complainant at that stage of the case, to have the cause so set down. What other effect can be given to the proceeding?

It was said in *Reynolds v. Crawfordsville Bank* 112 U. S. 405, 409:

"The setting the case down for hearing on bill and "answer is in effect a submission of the cause to the "court by the complainant, on the contention that he "is entitled to the decree prayed for in his bill upon the "admissions and notwithstanding the denials of the "answer."

This is the precise tenor of the claim made by the third, fifth and sixth paragraphs, under the misnomer of exceptions to the answer; by sustaining this claim, did not the court specifically decide in the language of the paragraphs:

"That it appears affirmatively from the answer of "the defendants, that the complainant has legally es- "tablished and is entitled to collect a water rental of "\$7.00 per acre per annum for the irrigation of the "lands of defendants . . . as alleged in the bill of com- "plaint (Par. 5th); and,

"That the said answer shows on its face that the "complainant is legally and equitably entitled to "charge and collect the rate of \$7.00 per acre for the "irrigation of the lands of defendants, and that said "rate is reasonable and just?" (Par. 6th).

We are unable to distinguish the substance of this submission from a formal submission on bill and answer.

To so hold it, does not contravene the decision in *Sanford Fork & Tool Co., supra*, 160 U. S. 247, 257-8; nor, go as far as did the decisions in *Barry v. Abbott* 100 Mass. 396, 398, and in *Grether v. Wright* 75 Fed. R. 742, 744; for in none of these cases, did the plaintiff rely upon the answer and submit that it established the right to the relief claimed in the bill. *This the complainant did here.* It is similar to the case of *Banks v. Manchester* 128 U. S. 244, 250.

"In such case allegations of new matter in the answer, are to be taken as true." *Banks v. Manchester, supra*, p. 251; and cases there cited. *Sanford Fork & Tool Co., supra*, 160 U. S. 247, 257.

It is therefore submitted that the original cause is to be treated as having been submitted by complainant on bill and answer and disposed of by final decree accordingly. Also that it should be so disposed of in this court, and in all further proceedings pursuant to its direction.

**The paragraph, entitled exception second to the Answer, is not an exception in substance or form, and it was error to sustain it.**

The bill alleges: "That each of said defendants has, by purchase or otherwise, become the owner of a wa-

"ter right to a part of the water appropriated and "stored by said company necessary to irrigate his tract "of land." The answer fully admits this (folio 24); then goes on to state (folios 24-34) in what way the several classes of defendants acquired their water rights from the corporation. The charge made in the exception is, in substance, that the answer does not state which of the defendants acquired their water rights by purchase, or how much they paid for them, and that for this reason the answer is evasive and uncertain.

But the allegation of the bill calls for no answer in these respects. It simply alleges that each of the defendants has *by purchase or otherwise* become the owner of a water right.

Having admitted this, the defendants were not required to detail which of them *purchased* their water rights, or which of them acquired their rights *otherwise*.

The bill makes no allegation in that respect; therefore it calls for no answer or discovery in that behalf.

The exception assumes incorrectly, that a theory of the defense in the answer, is to claim an abatement of the increase of rates to the extent of the interest on the money paid to the company in purchase of water rights. But this is an entire misapprehension.

Moreover an exception will not lie to a substantive

defense, not responsive to the plaintiff's inquiry in the bill.

*Adams v. Iron Co.* 6 Fed. Rep. 179.

*Bowen, Et., Iron Co. v. Wells, Et., Iron Co.*, 43 Fed. 391.

It is submitted that the second so-called exception to the answer was erroneously sustained, and that error in that behalf is well assigned. (Tr. folios 109, 163; specification in brief ante p. 59).

#### 5.

It is apparent without discussion, that the exception *fourth* (Trans. p. 60) is so defective in form that it is meaningless; it points out nothing; it fails to inform the defendants, or the court, of any insufficiency in the answer to any allegation of the bill.

It is submitted that this exception was erroneously sustained and that error in that behalf is well assigned. (Folios 110, 164; specification in brief p. 61).

#### 6.

**Notwithstanding that the "Exception" to the Answer numbered first, for impertinency, was sustained, it was error in procedure to render the decree pro-confesso, in disregard of the unexpunged admissions of the Answer and of the issues raised by the denials and averments remaining in the Answer, and not excepted to.**

This charge of error is presented by the *ninth* assignment in the bill of review, (Trans. p. 73), as preserved in the *thirteenth* assignment of error on appeal (folios

167-170), and the corresponding specification in the brief (ante pp. 64-69).

This assignment points out, not only that the unexpunged admissions and averments of the answer, showed all the matters which, appearing on the face of the bill, establish that the complainant has no cause of action, as argued in division VIII of this brief (ante p. 242); but in addition that the unexpunged averments of the answer show, if the whole question as to the rates were open, and not foreclosed under the facts, by the statute, and by the contracts and vested rights of the defendants as hereinbefore submitted, and it were now a question *de novo*, as to whether any increase of the \$3.50 rate were reasonable, that no increase would be reasonable.

The following, among the unexpunged portions of the answer are *in hac verba*:

"And these defendants deny that the annual expenses of said corporation to operate and maintain its water system exceed the sum of \$12,034.99, as in the bill alleged," (Folio 39).

"And these defendants deny and each of them denies that in order to pay the said company the amount of its annual expenses and an annual income of six per cent upon the present cost and present value of its said water system it is necessary that the rates for water sold and consumed be so fixed as to realize to said company, when its system is wholly employed, the sum of \$119,791.66 or any less sum in excess of \$32,000 per annum.

"And defendants aver that neither the present cost nor the present cash value of the whole of said property constituting said water system exceeds the sum

"of \$300,000.00, and that not over one-half of the capacity of said system was on January 1st, 1896, in use, and that not over two-thirds of the capacity of said system is now in use.

"And defendants deny that in order to pay the cost of operating the plant of said company and maintaining the same and pay said company as much as six per cent net annual revenue upon the present cost and cash value of its said plant and water system it is "or will be necessary to charge a rate per acre per annum of not less than \$7.00 for irrigation purposes or "any sum in excess of \$3.50 per acre per annum for irrigation purposes in connection with the rate for "water for domestic use under said system actually established and collected."

Now these allegations of the answer were not excepted to; taken together with the undenied and admitted allegations of the bill, they make material issues upon the vital parts of the bill, if the question of rates can be treated as *res integra*—i. e. as though the easements had not been purchased or otherwise acquired by defendants, and as though no contract express or implied as to rates had been made.

Under equity rule 64 the plaintiff for default of a full and complete answer after exception for insufficiency allowed, "is entitled only to take the bill, *so far as the matter of such exception is concerned*, as confessed." *In re Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, 256.

But there were no exceptions of any kind to the matters above quoted from the answer. There was not, as we think we have shown above, a single valid or proper exception for insufficiency to any part of the

answer; therefore, there was no matter concerned in any exception which could under the same, be taken *pro confesso*. It is true affirmative defenses were, as we have submitted, erroneously expunged.

But the parts of the answer unexcepted to, tendered issues upon the allegations of the bill; if those allegations of the bill were material, then the issues tendered by the answer were also material. Therefore it was grave error in the procedure to order the bill to be taken *pro confesso*, ignoring such issues tendered by the answer.

It was held in *Hovey v. Elliott* 167 U. S. 409, that not even where a defendant was guilty of contempt in disobeying an order of the court, did the court have the power to strike out his answer and order that a decree *pro confesso* be taken against him.

Much less would it seem to have been competent to order the bill in this case to be taken *pro confesso*, in disregard of issues tendered which, on the assumption that the bill stated a cause, were vital; and which remained and still remain in the answer unassailed and intact.

These unexpunged allegations of negative and affirmative matter in defense, were not inconsistent with the allegations that the easements of the defendants vested under contracts at the rate of \$3.50 per annum; for there is nothing inconsistent in the allegation that that was the contract rate, and also that it was sufficient

in connection with the domestic rates to pay the cost of operating and maintaining the plant, and to pay the company as much as six per cent upon the present cost and value of the plant.

The fact that the court passed its decree while the answer stood tendering the issues above stated, and without issue joined by replication, strengthen the argument that the real nature of the submission, under the *third, fifth and sixth* misnamed exceptions, was as above argued upon bill and answer. Then upon the theory adopted by the court as shown by its opinion, that the court could not go into the question of the reasonableness of the demanded \$7.00 rate, it is explicable how the decree, erroneous though it be, was reached; otherwise, considered in respect of the mere procedure, we are at a loss to see how it was reached.

It is respectfully submitted that in point of procedure, it was irregular to enter the decree in form *pro confesso*; and that although rendered such in form, it was in fact rendered on bill and answer; and that as such it is essentially final; and that if it be considered by the court that the bill states a cause of action, the decree is erroneous in not giving due effect to the unexpunged portions of the answer; and that if the bill states no cause of action the decree was erroneous as submitted in division VIII of this brief.

**The San Diego Land & Town Company of Maine did not become a party to the record so that it was competent to make the decree herein in its favor.**

The above proposition is presented by the *fifteenth* assignment of error in the bill of review (Trans. p. 78); in the *nineteenth* assignment of error upon appeal (Trans. p. 109); and, by the corresponding specification in this brief (ante p. 80).

The proceedings relating to the substitution of the San Diego Land & Town Company of Maine, have already been stated, (ante pp. 46-47). See also Trans. folios 93-99. The decree is in favor of "San Diego Land & Town Company of Maine, substituted as complainant in place of Charles D. Lanning, Receiver of the San Diego Land & Town Company, complainant." (Trans. p. 64).

The Receivership was of the Kansas corporation.

The Maine corporation was not a party to the motion, argument, or order directing the discharge of Lanning and the substitution of the Maine corporation. The first appearance of the Maine corporation was on Dec. 6, 1897, in moving for decree *pro confesso* (Trans. p. 62); from thence onward to, and in, the final decree its name appears as complainant.

But there is no allegation in the complaint, or in any supplemental complaint, to show who, or what the San Diego Land & Town Company of Maine is; or

what is its interest in the suit, or what claim it has to relief.

There is a suggestion in the notice of motion (folio 93) that all the property mentioned and described in the bill of complaint had, under the decree of the court, been sold by the Receiver to said San Diego Land & Town Company of Maine and the proceeds of the sale received by the Receiver; that the receivership had been fully settled and closed, and that the San Diego Land & Town Company of Maine had acquired all the right, title and interest of the San Diego Land & Town Company of Kansas in and to all of said property and is now the only party interested in the further litigation of the questions in this suit.

But this is entirely *inter alia*; it does not supply the place of issuable allegations by the complainant to be substituted. The decree proceeds on the bill and not otherwise; and until the bill by proper supplement is made to contain proper allegations to show change of interest, and that the substituted complainant is the real party in interest in issuable form, upon what basis of allegation or proof, or confession, does the decree go for the new plaintiff?

The case of a suit becoming defective by transfer pursuant to judicial sale of the entire interest of the complainant, as suggested in the motion, is provided for in Equity Rule 57.

The authorities seem to establish that the proper practice in such a case, is for the transferee of the or-

iginal plaintiff to file an original bill in the nature of a supplemental bill, and not a supplemental bill merely.

*Greenleaf v. Queen* 1 Pet. 138, 148.

*Tappan v. Smith* 5 Biss 73, Fed. Cases No. 13748.

*Hazelton & Co. v. Citizens' St. Ry. Co.* 72 Fed. Rep. 325, 329.

Story's Equity Pl. Secs. 348, 349.

The defendants have the right to demur, plead or answer to such bill.

The sum paid at a purchase of the water system under the decree of a court, may be material in an action relating to water rates under such system. *Dow v. Biddleman* 125 U. S. 680, 690-1. Upon an original bill in the nature of a supplemental bill the whole case is open; 2 Daniell Ch. 4 Am. Ed. 1518, 1519, citing Lord Redesdale, 64, 65. To that opportunity defendants were entitled.

It is submitted that this error in procedure is well assigned.

8.

#### **Jurisdiction of the Circuit Court over the Cause.**

This question is raised by the *sixteenth* assignment of error in the bill of review, (Trans. p. 78), and the corresponding assignments of error on appeal and specifications in the brief.

The original bill shows a controversy between citizens of different states, but does not show that the amount involved between the plaintiff and any defendant severally interested, or any defendants jointly interested, equals the sum of \$2,000 (Trans. pp. 6-12). The answer (folio 50) shows to the contrary. It is not competent to aggregate the claims to increase of water rates against different defendants, severally interested, in order to make out the jurisdictional amount. *Walter v. Northeastern Railroad Company* 147 U. S. 370, 373, and cases there cited.

Nor could any unaccrued increase of rentals be considered to make out the jurisdiction. See the following cases involving the analogous questions relating to the appellate jurisdiction of this court.

*Washington, etc., Railroad v. District of Columbia*  
146 U. S. 227, 252.

*Clay Center v. Farmers' Loan & Trust Co.* 145 U. S.  
224, 225.

Considered as an original suit, and independent of the suit in which the Receiver was appointed, the amount involved is not shown by the original bill to be sufficient to make out the jurisdiction; and it appears by the answer to be insufficient.

Hence the assertion of jurisdiction in the Circuit Court must be rested on the claim that this suit is ancillary to that in which the Receiver was appointed.

The original bill (in the sense of the rules of equity

pleading) in the case at bar, showed in substance, that Charles D. Lanning was by an order and decree of the Circuit Court of the United States for the District of Massachusetts made in another cause, September 4, 1895, and confirmed Sept. 30, 1895, by the order and decree of the Circuit Court below, appointed Receiver of all the property of the Kansas corporation "with full power to take possession of and manage and operate and control all of its said property including the land and water system in this bill mentioned"; and that by virtue of said orders and decrees the complainant took possession of and is managing said property as such Receiver (Trans. p. 8). The bill further shows that the attempt of the Receiver to establish the increased rental, and to enforce the payment of such increase by shutting off the water from the premises of the defendants, was done under a claim that he was authorized by law so to do (Trans. p. 11); and the suit is brought to enforce such claims both to the increase of rents, and to the power to shut off the water to enforce collection thereof.

It was said in the case of *Pope v. Louisville, New Albany & Chicago Railway Company*, 173 U. S. 573, 577:

"When an action or suit is commenced by a receiver, appointed by a Circuit Court, to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the Circuit Court as a Court of the United States is concerned."

If the fact of a mere claim made in his bill by the Receiver, that he had authority to increase the irrigation

rate and to enforce collection of it, brings the case for purposes of jurisdiction, within the terms of the power conferred by the order of his appointment, then the ancillary jurisdiction is made out.

If, on the other hand, in order to establish the ancillary jurisdiction, it must appear *in limine*, upon the face of the bill, that this suit was commenced to accomplish the ends sought and directed in the order appointing the Receiver; that is to say, if it must appear, as preliminary, that general authority to make and enforce new rates as against vested easements, was, as shown on face of the bill, in fact embraced in the power conferred on the Receiver by the order, to manage, operate and control the water system, then it would seem that the main question upon the merits, in the case, must be determined in order to ascertain whether ancillary jurisdiction has attached.

For how can there be ancillary jurisdiction, unless the case as stated in the bill, is within the scope and terms of the powers alleged to be conferred on the Receiver?

Allegations of fact showing that the case is in fact ancillary must be made, before the courts can entertain the case as ancillary; if these allegations fail, how does it appear that there was ancillary jurisdiction?

In the case of *H. Hite v. Ewing* 159 U. S. 36, 38, there could be no question on the face of the ancillary bill, but that the suit to collect debts alleged to be due the corporation, was in the strict line of the order appoint-

ing the Receiver. The case therefore on the face of the bill showed ancillary jurisdiction.

But here the question arises on the face of the bill, whether the purpose and object of the suit is comprehended within the power alleged to have been conferred in the suit in which the Receiver was appointed, to take possession of and manage, operate and control the water system.

With these observations, we submit the question of jurisdiction with the further remark, that in any point of view, the cardinal question upon the merits in the case, stands for decision.

The power conferred upon the Receiver by the order appointing him, is the same power which the corporation would have had but for the appointment of the Receiver—no greater. The question, therefore, as to what power over rates, as against these defendants, was embraced in the order appointing the Receiver, is the same in substance, as the question whether the corporation itself had the lawful power to increase the irrigation rate, and to shut off the water to enforce collection of such rate, in the manner shown by the record. And the question whether a power to increase the irrigation rate, was conferred on the Receiver by the order appointing him, is the same as, whether he was entitled to the relief prayed for in the bill.

**CONCLUSION.**

The statement of the main question in this case, to which all others are subordinate, viz: Whether in this state, contract relations between water corporations and irrigators of land, respecting water rights and water rates, can come into existence, shows its importance; the question is upon a scale as extended as the boundaries of the state.

It is hoped that no want of respectful earnestness of dissent from the views entertained, with his accustomed firmness, by the able, highminded, and honored Circuit Judge, who made the decision, detracts from the propriety of the foregoing discussion. The principles involved, stand upon a height which make them sacred, and impersonal.

New and alien schools of social organization and of polities, are attacking with gathering force the essential ideas which penetrate and inform every recess of the Federal Constitution, and for the most part the Constitutions of the States. This case illustrates the famous Eighteenth declaration of rights in the Constitution of Massachusetts of 1780, and shows that "a frequent recurrence to the fundamental principles of the Constitution" is "absolutely necessary to preserve the advantages of liberty and to maintain a free government." And if the invoking of these constitutional principles by individuals, as in this case, against corporate power, is less frequent than the invoking by corporations of constitutional safeguards against en-

croachment by popular bodies, it only illustrates the equal beneficence of these precious and time-honored guarantees.

It is respectfully submitted upon the record, that the demurrer to the bill of review was erroneously sustained; and that the decree of the Court below, dismissing the bill of review, should be reversed, and the record remanded with instructions to reverse the decree in the original suit, and to finally dismiss the bill filed therein; or, for such other proceedings in such original suit, as are not inconsistent with the opinion of the court.

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For Appellants.

GEO. FULLER, of Counsel.

**APPENDIX.****Constitution of State of California:****ARTICLE I.****Declaration of Rights.**

Section 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.

**ART. XII.****Corporations.**

Section 15. No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State.

**ART. XIV.****Water and Water Rights.**

Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; provided that the rates or compensation to be collected by any person, company, or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year, and no longer. Such ordinances or resolutions shall be passed in the month

of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company, or corporation to the city and county, or city or town where the same are collected, for public use.

Sec. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.

#### **ART. XX.**

Sec. 9. No perpetuities shall be allowed except for eleemosynary purposes.

#### **STATUTES.**

*Act*, approved May 14, 1862 (Statutes of Cal. 1862, p. 540).

Section 1. Corporations may be formed, under the provisions of an Act entitled an Act to provide for the Formation of Corporations for certain purposes, passed April fourteenth, eighteen hundred and fifty-three, and the several Acts amendatory thereof and supplemental thereto, for the following purposes: The construction of canals, for the transportation of passengers and freights, or for the purpose of irrigation or water power, or for the conveyance of water for mining or manufacturing purposes, or for all of such purposes.

Sec. 2. The right is hereby granted to any company organized under the authority of this Act, to construct all works necessary to the objects of the company, to make all surveys necessary to the selection of

the best site for the works, and of lands required therefor, and to acquire all lands, waters not previously appropriated, and other property necessary to the proper construction, use, supply, maintenance, repairs, and improvements of the works in the manner and by the mode of proceedings prescribed in an Act entitled an Act to provide for the Incorporation of Railroad Companies, and the management of the affairs thereof, and other matters relating thereto, passed May twentieth, eighteen hundred and sixty-one.

Sec. 3. Every company organized as aforesaid shall have power, and the same is hereby granted, to make rules and regulations for the management and preservation of their works, not inconsistent with the laws of this State, and for the use and distribution of the waters and the navigation of the canals, and to establish, collect, and receive rates, water rents, or tolls, which shall be subject to regulation by the Board of Supervisors of the county or counties in which the work is situated, but which shall not be reduced by the Supervisors so low as to yield to the stockholders less than one and one-half per cent per month upon the capital actually invested.

\* \* \* \* \*

Sec. 6. This Act shall take effect from and after its passage.

#### ACT

**Approved April 5, 1876.**

(Civil Code Sec. 552). Whenever any corporation, organized under the laws of this State, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it with which to irrigate his land, such person shall be entitled to the continued use of said

water, upon the same terms as those who have purchased their land of the corporation.

**ACT**

**Approved March 12, 1835.**

"Section 1. The use of all water now appropriated, "or that may hereafter be appropriated, for irrigation, "sale, rental, or distribution, is a public use, and the "right to collect rates or compensation for use of such "water is a franchise, and except when so furnished to "any city, city and county, or town or the inhabitants "thereof, shall be regulated and controlled in the "counties of this State by the several Boards of Super- "visors thereof, in the manner prescribed in this Act.

"Section 2. The several Boards of Supervisors of "this State, on petition and notice as provided in sec- "tion three of this Act, are hereby authorized and re- "quired to fix and regulate the maximum rates at "which any person, company, association or corpora- "tion, having or to have appropriated water for sale, "rental or distribution, in each of such counties, may "and shall sell, rent or distribute the same.

"Section 3. Whenever a petition of not less than "twenty-five inhabitants, who are tax payers of any "county of this State, shall, in writing, petition the "Board of Supervisors thereof, to be filed with the "Clerk of said Board, to regulate and control the rates "and compensation to be collected by any person, "company, association, or corporation, for the sale, "rental, or distribution of any appropriated water, to "any of the inhabitants of such county, and shall in "such petition specify the persons, companies, associa- "tions, or corporations, or any one or more of them, "whose water rates are therein petitioned to be regu- "lated or controlled, the Clerk of such Board shall im- "mediately cause such petition, together with a no- "tice of the time and place of hearing thereof, to be "published in one or more newspapers published in "such county; and if no newspaper be published "therein, then shall cause copies of such petition and "notice to be posted in not less than three public places "in such counties, and such publication and notice

"shall be for not less than four weeks next before the "hearing of said petition by said Board; such notice to "be attached to said petition shall specify a day of the "next regular term of the session of the said Board, "not less than thirty days after the first publication, "or posting thereof, for the hearing of said petition, "which shall impart notice to all such persons, com- "panies, associations, and corporations, mentioned in "such petition, and all persons interested in the mat- "ters of such petition and notice. Such Board may "also cause citations to issue to any person or persons "within such county, to attend and give evidence at "the hearing of such petition, and may compel such "attendance by attachment.

"Sec. 4. At the hearing of said petition the Board "of Supervisors shall estimate, as near as may be, the "value of the canals, ditches, flumes, water chutes, and "all other property actually used and useful to the ap- "propriation and furnishing of such water, belonging "to and possessed by each person, association, com- "pany, or corporation, whose franchise shall be so reg- "ulated and controlled; and shall in like manner es- "timate as to each of such persons, companies, associ- "ations, and corporations, their annual reasonable ex- "penses, including the cost of repairs, management, "and operating such works; and, for the purpose of "such ascertainment, may require the attendance of "persons to give evidence, and the production of pa- "pers, books, and accounts, and may compel the at- "tendance of such persons and the production of pa- "pers, books, and accounts, by attachments, if within "their respective counties.

"Sec. 5. In the regulation and control of such wa- "ter rates, for each of such persons, companies, associa- "tions, and corporations, such Board of Supervisors "may establish different rates at which water may and "shall be sold, rented, or distributed, as the case may "be; and may also establish different rates and com- "pensation for such water so to be furnished for the "several different uses, such as mining, irrigating, me- "chanical, manufacturing, and domestic, for which

"such water shall be supplied to such inhabitants, but "such rates as to each class shall be equal and uni- "form. Said Boards of Supervisors, in fixing such "rates, shall, as near as may be, so adjust them that the "net annual receipts and profits thereof to said per- "sons, companies, associations, and corporations so "furnishing such water to such inhabitants shall be not "less than six nor more than eighteen per cent upon "the said value of the canals, ditches, flumes, chutes, "and all other property actually used and useful to the "appropriation and furnishing of such water for each "of such persons, companies, associations and corpora- "tions; but in estimating such net receipts and profits, "the cost of any extensions, enlargements or other "permanent improvements of such water rights or "water works shall not be included as part of the said "expenses of management, repairs, and operating of "such works, but when accomplished, may and shall "be included in the present cost and cash value of such "work. In fixing said rates, within the limits afore- "said, at which water shall be so furnished as to each "of such persons, companies, associations, and corpora- "tions, each of said Board of Supervisors may like- "wise take into estimation any and all other facts, cir- "cumstances, and conditions pertinent thereto, to the "end and purpose that said rates shall be equal, rea- "sonable, and just, both to such persons, companies, "associations, and corporations, and to said inhabi- "tants. The said rates, when so fixed by such Board, "shall be binding and conclusive for not less than one "year next after their establishment, and until estab- "lished anew or abrogated by such Board of Supervis- "ors, as hereinafter provided. And until such rates "shall be so established, or after they shall have been "abrogated by such Board of Supervisors, as in this "Act provided, the actual rates established and col- "lected by each of the persons, companies, association "and corporations now furnishing, or that shall herein- "after furnish, appropriated waters for sale, rental, or "distribution to the inhabitants of any of the counties "of this State, shall be deemed and accepted as the le- "gally established rates thereof.

"See. 6. At any time after the establishment of such water rates by any Board of Supervisors of this State, the same may be established anew, or abrogated in whole or in part by such Board, to take effect not less than one year next after such first establishment, but subject to said limitation of one year, to take effect immediately in the following manner: Upon the written petition of inhabitants as hereinbefore provided, or upon the written petition of any of the persons, companies, associations, or corporations, the rates and compensations of whose appropriated waters have already been fixed and regulated and are still subject to such regulation by any Board of Supervisors of this State, as in this Act provided; and upon the like publication or posting of such petition and notice, and for the like period of time as hereinbefore provided, such Board of Supervisors shall proceed anew, in the manner hereinbefore provided, to fix and establish the water rates for such person, company, association, or corporation, or any number of them, in the same manner as if such rates had not been previously established; and may, upon the petition of such inhabitants but not otherwise, abrogate any and all existing rates theretofore established by such Board. All water rates when fixed and established as herein provided, shall be in force and effect until established anew or abrogated, as provided in this Act.

"See. 7. Each Board of Supervisors of this State, when fixing and establishing, or fixing and establishing anew, or abolishing any previously established water rates, as hereinbefore provided, shall cause a record to be made thereof in the records of such Board, and cause the same to be published or posted in the manner and for the time required for the publication or posting of said petitions and notices.

"See. 8. Any and all persons, companies, associations, or corporations, furnishing for sale, rental, or distribution, any appropriated waters to the inhabitants of any county or counties of this State (other than to the inhabitants of any city, city and county, or town therein), shall so sell, rent, or distribute such

"waters at rates not exceeding the established rates fixed and regulated therefor by the Boards of Supervisors of such counties, or as fixed and established "by such person, company or association, or corporation, as provided in this Act.

"Sec. 9. If any person, company, association, or corporation whose water rates for any county of this State have been fixed and regulated by a Board of Supervisors, as in this Act provided, and while such rates are in force, shall collect for any appropriated water furnished to any inhabitant of such county water rates in excess of such established rates, shall be liable, in an action by any such inhabitant so aggrieved, to a recovery of the whole rate so collected, "together with actual damages sustained by such inhabitant, with costs of suit.

"Sec. 10. Every person, company, association, and corporation, having in any county in the State (other than in any city, city and county, or town therein) appropriated waters for sale, rental or distribution, to the inhabitants of such county, upon demand therefor, and tender in money, of such established water rates, shall be obliged to sell, rent, or distribute such water to such inhabitants at the established rates regulated and fixed therefor, as in this Act provided, "whether so fixed by the Board of Supervisors or otherwise, to the extent of the actual supply of such appropriated waters of such person, company, association, or corporation, for such purposes. If any person, company, association, or corporation, having water for such use, shall refuse compliance with such demand, or shall neglect, for the period of five days after such demand, to comply therewith to the extent of his or its reasonable ability so to do, shall be liable in damages to the extent of the actual injury sustained by the person or party making such demand and tender, to be recovered, with costs.

"Sec. 11. Whenever any person, company, association or corporation, shall have acquired the right to appropriated water, or shall have acquired the right "to appropriate such water in this State, such person, "company, association, or corporation, may proceed

"to condemn the lands and premises necessary to such right of way, under the provisions of title seven, of part third, of the Code of Civil Procedure of this State, and amendments made and to be made thereto, and all the provisions of said Code, so far as the same can be made applicable, relating to the condemnation and taking of property for public uses, shall be applicable to the provisions of this Act.

"Sec. 12. This Act shall take effect and be in force from and after its passage."

#### **ACT**

**Approved March 2, 1897, (Statutes 1897, p. 49).**

Section 1. The Act entitled "An Act to regulate and control the sale, rental, and distribution of appropriated water in this State, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use," approved March twelfth, eighteen hundred and eighty-five, is hereby amended by inserting therein a new section, to be numbered section eleven and one-half thereof, as follows:

Section 11 1-2. Nothing in this Act contained shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made, by or with any of the persons, companies, associations, or corporations described in section two of this Act, relating to the sale, rental, or distribution of water, or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract.

Sec. 2. This Act shall take effect immediately, and be in force from and after its passage.

#### **CIVIL CODE.**

Sec. 711. Conditions restraining alienation, when repugnant to the interest created, are void.

Sec. 715. The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limita-

tion or condition, except in the single case mentioned in section seven hundred and seventy-two.

Sec. 716. Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.

Sec. 772. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority.

#### SERVITUDES.

Sec. 801. The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements:

1. The right of pasture;
2. The right of fishing;
3. The right of taking game;
4. The right of way;
5. The right of taking water, wood, minerals, and other things;
6. The right of transacting business upon land;
7. The right of conducting lawful sports upon land;
8. The right of receiving air, light, or heat from over, or discharging the same upon or over land;
9. *The right of receiving water from or discharging the same upon land;*
10. The right of flooding land;
11. *The right of having water flow without diminution or disturbance of any kind;*
12. \* \* \* \* etc., etc.

Section 802. The following burdens, or servitudes upon land, may be granted and held, though not attached to land:

1. The right to a pasture, and of fishing and taking game;
2. The right of a seat in church;
3. The right of burial;
4. The right of taking rents and tolls;
5. The right of taking water, wood, minerals, or other things.

Sec. 803. The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement.

Sec. 804. A servitude can be created only by one who has a vested estate in the servient tenement.

Sec. 805. A servitude thereon cannot be held by the owner of the servient tenement.

Sec. 806. The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired.

Sec. 807. In case of partition of the dominant tenement, the burden must be apportioned according to the division of the dominant tenement, but not in such a way as to increase the burden upon the servient tenement.

Sec. 808. The owner of a future estate in a dominant tenement may use easements attached thereto for the purpose of viewing waste, demanding rent, or removing an obstruction to the enjoyment of such easements, although such tenement is occupied by a tenant.

Sec. 809. The owner of any estate in a dominant tenement, or the occupant of such tenement, may maintain an action for the enforcement of an easement attached thereto.

Sec. 810. The owner in fee of a servient tenement may maintain an action for the possession of the land, against any one lawfully possessed thereof, though a servitude exists thereon in favor of the public.

Sec. 811. A servitude is extinguished:

1. By the vesting of the right to the servitude and the right to the servient tenement in the same person;
2. By the destruction of the servient tenement;

3. By the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise; or,
4. When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment.

#### **OCCUPANCY.**

Sec. 1007. Occupancy for the period prescribed by the Code of Civil Procedure, as sufficient to bar an action for the recovery of the property, confers a title thereto, denominated a title by prescription, which is sufficient against all.

#### **EFFECT OF TRANSFER.**

Sec. 1104. A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

#### **WATER RIGHTS.**

Sec. 1410. The right to the use of running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation.

Sec. 1411. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases.

Sec. 1412. The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made.

Sec. 1413. The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed; but in reclaiming it, the water already appropriated by another must not be diminished.

Sec. 1414. As between appropriators, the one first in time is the first in right.

Sec. 1415. A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point of intended diversion, stating therein:

1. That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure;

2. The purposes for which he claims it, and the place of intended use;

3. The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it.

A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.

Sec. 1416. Within sixty days after the notice is posted the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain.

Sec. 1417. By "completion" is meant conducting the waters to the place of intended use.

Sec. 1418. By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted.

Sec. 1419.—A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith.

Sec. 1420. Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases.

Sec. 1421. The record of each county must keep a book, in which he must record the notices provided for in this title.

Sec. 1422. The rights of riparian proprietors are not affected by the provisions of this title. (Repealed,

but not affecting rights already vested, March 15, 1887.)

**CODE OF CIVIL PROCEDURE.**

Sec. 318. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action.

**CONSTITUTION OF COLORADO.**

For Sections 5 and 8 of Art. XIV, see *ante* p. 191.